(1)

90-457

No.

Supreme Court, U.S.
FILED
SEP 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ADELE GRAHAM, individually and as representative of a class of persons similarly situated,

Petitioner,

vs.

STATE OF NEW YORK, DEPARTMENT OF CIVIL SERVICE; EDWARD V. REGAN, as Comptroller of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Does the decision in Florida v. Long, 487 U.S. 223 (1988) require the denial of prospective and retroactive relief in a Title VII case not involving pensions or an actuarially-derived pension fund.

II. Was the State of New York fairly put on notice prior to August 1, 1983 of the impropriety under Title VII of its use of sex-segregated actuarial tables in the calculation of terms and conditions of employment.

III. Is the continuation into perpetuity of a disparity in the fringe benefits received by male and female retirees from July 1978 until August 1983 a "'just result'" in light of the circumstances peculiar to the case.

IV. Is the interpretation of Florida v.

Long by the Court below an attempt to rewrite Title VII by its overly broad holding that Long "prohibited retroactive awards that would burden the State or a private employer with additional financial obligations."

V. In the light of the specific language of section 167.4 of the New York Civil Service Law, could the State of New York reasonably interpret the sick leave credit/health insurance scheme here at issue as a benefit rather than a contribution.

PARTIES TO THE PROCEEDINGS

Adele Graham and Tamaara Danish were the original parties plaintiff.

State of New York, Department of Civil Service, Edward V. Regan, as comptroller of the State of New York, and Mario Cuomo, as governor of the State of New York, were the original parties defendant.

By stipulation, Tamaara Danish was dismissed as a party plaintiff. By stipulation, the State of New York and Mario Cuomo were dismissed as parties defendant.

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DECISIONS BELOW

The decision of the Second Circuit, decided June 28, 1990, has not yet been reported. The decision of the District Court on remand, appealed from, is reported at 716 F.Supp. 802 (S.D.N.Y. 1989).

The prior decision of the Second Circuit is reported at 861 F.2d 381 (2d Cir. 1988). The prior decisions of the District Court are reported at 653 F.Supp 1363 (S.D.N.Y. 1987) and 664 F.Supp. 166 (S.D.N.Y. 1987), respectively.

JURISDICTION

The judgment sought to be reviewed was dated and entered on June 28, 1990.

Jurisdiction to review the judgment by writ of certiorari is conferred by 28 U.S.C. section 1254(1).

STATUTES INVOLVED IN THE CASE

The case involves 42 U.S.C. section 2000e, Title VII of the Civil Rights Act of 1964 as amended.

The case was also brought under the Fourteenth Amendment to the United States Constitution, 42 U.S.C. section 1983, and the New York State Constitution, Article 1 section 11.[1] The pertinent texts are

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1 Those claims were eventually withdrawn so as to join the Title VII issue without interference through the pendency on the non-Title VII issues. Petitioner Adele Graham asserted an individual pendent claim sounding in contract, for the failure of the Department

set forth in the Appendix.

STATEMENT OF THE CASE

After exhaustion of administrative remedies under Title VII, and receipt of a notice of right to sue, petitioners brought this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000e-2 and 2000e-5(g), 42 U.S.C. section 1983, the Fourteenth Amendment to the United States Constitution, Article 1 section 11 of the New York Constitution, and in contract, challenging the actions of New York State, its Department of Civil Service, and its comptroller, in calculating benefits for women retirees less

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of Civil Service to keep its written commitment to make her whole. Like the non-Title VII federal claims and the State constitutional claim, the contract claim was withdrawn pendent.

favorably than for men retirees, as a violation of Title VII and the Fourteenth Amendment.

Factual and Legal Basis For Suit

Present and retired employees of the State of New York are entitled to receive health insurance benefits, pursuant to sections 161 and 163 of the New York Civil Service Law. Under section 167, the State pays for 100% of the premiums charged for the health insurance for employees, and 75% of the premiums charged for the option of enrollment of dependents of employees in the statewide plan. Such premiums are deducted from employees' pay checks or, in the case of retired employees, from retirees' pension checks.[2]

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2 Other deductions are also made from pension checks, such as Federal withholding tax,

Retirees, who are required to pay premiums for their dependents, may reduce or eliminate the charge therefor by the use of accumulated but unused sick leave credits. The amount of money that can be so used is calculated by converting unused sick leave credits to a dollar amount and then dividing that dollar amount by an actuarially-derived number: that is, the life expectancy. The dividend is the monthly health insurance premium credit. See Section 167.4. As an illustrative example:

An employee has unused at retirement sick leave credits of thirty days. The employee's wage was $100 per day. Thus $3,000 (30 x $100) was available to the employee for health insurance premium

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savings bonds, medicare premiums, and other deductions.

reduction. The life expectancy at retirement for that employee was ten years, or 120 months. Dividing $3,000 by 120, results in a monthly insurance premium reduction of $25.00. The health insurance premium is $35.00. Thus the retiree must pay only $10 per month, deducted from the monthly pension check.

Another employee, also earning $100 per day and with 30 days of unused sick leave at retirement, has a life expectancy of 15 years, or 180 months. Dividing $3,000 by 180 gives that retiree only $16.66 in premium reduction; thus this retiree must pay $18.33 per month, deducted from the monthly check.

All health benefits, for both employees and retirees, are paid for out of a "health insurance fund" under section 167.6. The fund consists of

amounts withheld from employees and retired employees, all amounts appropriated annually by the State to such health insurance fund, and all amounts contributed by any participating employer under section 167.2. The amounts for health insurance premiums, including the health insurance premium paid for at 100% for employees, the premium paid for at 75% for dependents, and the sums allotted for unused sick leave accumulations, are all included in the annual budget appropriation. There is no separate fund or sum of money set aside to pay for the unused sick leave credits; this money comes in the appropriation.

Prior to July 1 1983, the State calculated the amount of sick leave credits which could be used to reduce

retirement health insurance premiums differently for men and women. Separate sex actuarial tables were used; these tables showed a life expectancy for women as approximately 7 years longer than for men. Accordingly, a woman with a $3,000 sick leave credit was allowed a health insurance premium reduction far less than was allowed for a man of the same age and with the same $3,000 sick leave credit.

On August 1, 1983, the State equalized the allowances for men and women who retired on or after that date, by using a so-called unisex life expectancy table.[3] Persons who retired prior to that date, including the retirees in the stipulated class,

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3 Women who retired between July 1, 1983 and July 31, 1983 had male actuarial tables used to calculate their premium reductions.

suffered the male-female disparity in allowances against health insurance premiums in perpetuity. The stipulated class included all women retirees from April 25, 1978 to July 31, 1983.

History of the Case

After a timely filing of complaint with the Equal Employment Opportunity Commission (EEOC) on or about December 17, 1981, a Notice of Right to Sue was issued on March 28, 1984. Thereafter this action was timely commenced in June, 1984.

On an Agreed Statement of Facts, a Supplemental Statement of Agreed Facts, and affidavits, the case was submitted to the trial Court on cross-motions for summary judgment. The Court held, Graham v. State of New York, 653 F.Supp. 1363 (S.D.N.Y. 1987), that the practice of New

York State in calculating benefits was a violation of law and ordered both retroactive relief and prospective relief to plaintiff and others in her class. The retroactive relief ordered would have the effect of making plaintiff whole by making her past benefits equal to those benefits which had already been paid to similarly-situated males-- the so-called "topping-up" relief.

The decision was based, in part, on a holding that City of Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) put the State on notice of the illegality of the use of sex-based actuarial tables in the calculation of terms and conditions of employment. The court opined, without deciding, that the New York sick leave credit conversion system fell within the Manhart

"contribution" scheme.

On a motion for reargument, the District Court reiterated its Manhart "notice" finding and further found that the cost of giving Title VII relief, "roughly half a million dollars," would not unduly burden the New York State Treasury.

On the State's appeal to the Second Circuit, the parties stipulated to withdraw the appeal without prejudice pending a decision by this Court in State of Florida v. Long, 487 U.S. 223, 108 S.Ct. 2354, 101 L.Ed.2d 206 (1988). After reinstatement to the Circuit's docket within thirty days of this Court's decision in Long, and after briefing and oral argument, including in both respects discussion of Long, the case was remanded by the Circuit to the District Court for

the latter's consideration of the effect of Florida v. Long on its prior analyses. Graham v. State of New York, 861 F.2d 381. After remand and without consideration of any of the plaintiff's non-Title VII claims, the District Court vacated its earlier opinions and dismissed the complaint for retroactive relief under Title VII. Graham v. State of New York, 716 F.Supp. at 804.

On plaintiff's appeal, the Second Circuit held that the instructions of Florida v. Long in the pension context made inappropriate retroactive relief in this non-pension case because

(1) Manhart did not fairly put the State on notice since the scheme here is a "benefit", not a contribution; (2) alternatively, "New York could have concluded in good faith that the health

credit scheme involved unequal benefits"; (3) the deterrence principle is not applicable because the State acted promptly after Norris[4] to implement a sex-neutral plan with respect only to post-Norris retirees; (4) Long prohibits "retroactive awards that would burden the State or a private employer with additional financial obligations"; (5) male retirees have a colorable contractual right to a current level of benefits and it would be inequitable to reduce that level.

REASONS FOR GRANTING THE WRIT

A. The Circuit Court has impermissibly and without rationale therefor expanded the reasoning of this Court in Long, applied to pensions, to an undefined

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4 Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983).

"variety of factual contexts."

Title VII itself put employers on notice that they could not continue to use practices that resulted in discrimination, and that they might be responsible for retroactive and prospective monetary amounts to make their employees whole for the financial damage they incurred because of the employers' practices.

The States were made subject to Title VII by the 1972 amendment. "Make whole" became the dominant principle of relief for Title VII cases, under Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), Franks v. Bowman, 424 U.S. 747 (1976), Bazemore v. Friday, 478 U.S. 385 (1986), and their progeny.

In the pension context, this Court limited the basic retroactive relief

generally available under Title VII from private and governmental employers alike. In Manhart, Norris, and Long, supra, retroactive relief was restricted in cases involving the pension systems of a large municipal government and two sovereign states, whose pension systems had discriminated on the basis of sex. The Court's rationale in these cases for limiting the general make-whole principles was foreseeability and economic disaster. That is, in Manhart it was said that pension administrators might not have realized that their program of unequal contributions to achieve equal benefits was unlawful. The financial impact of a retroactive award on a pension fund was called "devastating."

Likewise in Norris, relief was

restricted because the Arizona pension administrators "might reasonably have assumed" that their program of equal contributions resulting in unequal benefits was lawful. Again, the financial impact of a retroactive award on the Arizona system was called "catastrophic."

These rationales for limiting retroactivity apply to pension systems which have "funds" accumulated over many years based on actuarial assumptions. The Long decision was specifically keyed to pensions and pension funds-- to the "basic financial calculus of a pension plan that determines contribution rates to support a predicted level of payments... based on a past assessment of an employee's expected years of service, date of retirement, average final salary, and years of projected benefits." 487

U.S. at 238-239. (Emphasis supplied)

Now the Circuit decision has gone way beyond this rationale. It would sweep with the Long broom in all kinds of factual situations which have no rational relationship to the Long reasoning. The decision, read literally, would undermine all Title VII precedents awarding back pay, front pay, and other monetary awards, a shocking misreading of Long.[5] This indefensible language would rewrite Title VII and the enormous body of case law developed under the statute and its general make-whole interpretations. The Circuit has thus "decided a federal question in a way in conflict with

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5 "The Long court, by implication, also prohibited retroactive awards that would burden the State or a private employer with additional financial obligations." Appendix 124a.

applicable decisions of this Court." Rule 17.1(c).

B. The rulings below denying both retroactive and prospective relief deny equity to the plaintiff class: they are forever subject to a financial disparity with similarly-situated males although it is well within the power and means of the employer to end this discrimination in perpetuity. Such is not a "just result" in these circumstances.

C. The Circuit has come to a diametrically opposite conclusion as to the impact of Long from the conclusion reached by the Supreme Court of Connecticut. That court narrowly construed Long, in State v. Commission on Human Rights, 211 Ct. 464, 559 A.2d 1120 (1989), holding, inter alia, that a retroactive award would not unduly burden

Connecticut's pension system, does not raise the "spectre of insolvent pension plans throughout the fifty states," and applying Long broadly would do "a greater inequity" because it would deter complaints of discrimination. The Court finally analogized to Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3d Cir. 1973).[6] Certiorari may be

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6 Two other bases for not expanding Long were provided by the Connecticut court; the "fair warning" of Title VII violation given by Fitzpatrick v. Bitzer, 390 F.Supp. 278 (D.Conn. 1974), rev'd in part on other grounds, 519 F.2d 559 (2d Cir. 1975), rev'd on other grounds, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). See pages 40,42,44-45, infra, for discussion of the impact of this case on New York State's conduct.
The first reason cited was the mandatory relief requirements of the Connecticut statute, General Statutes section 46(a)-88(a) as contrasted with the permissive language of Title

granted when "a federal court of appeals has decided a federal question in a way in conflict with a State court of last resort." Rule 17.1(a).

D. The Circuit's decision is moreover in direct conflict with the holding of the New York Court of Appeals in Lippman v. Board of Education of the Sewanhaka, 66 N.Y.2d 313, 496 N.Y.Supp.2d 987 (1985) which specifically excluded health insurance from the definition of retirement benefits. The New York court of last resort also stated that male employees had no contractual right not to have the State's contribution to the payment of health insurance premiums reduced. The Circuit, in contrast, found that male employees had a "colorable

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VII. The Circuit decision disagreed, saying that Bitzer did not give New York fair warning.

contractual right to their current level of benefits," directly contradicting New York's holding.

The Circuit, in applying a Long analysis based on pension benefits, is at cross-purposes with this New York ruling.[7] It also collides with this Court's holding in Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983), see page 685, note 26.

ARGUMENT AMPLIFYING REASONS FOR ALLOWING THE WRIT

POINT I

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7 Lippman's holding and impact were argued below. The New York decision is not referred to in the Circuit decision.

STATE OF FLORIDA V. LONG WAS NOT INTENDED TO BE USED AS A BROOM TO SWEEP BROADLY IN NON-PENSION CASES

The basic substance of Title VII--the make-whole approach-- has not been undermined by the three major pension decisions of this court, Manhart, Norris, and Long. Still standing straight and tall are the principles of Albemarle Paper Co. v. Moody, supra, Franks v. Bowman, supra, Int'l Bro. of Teamsters v. United States, 431 U.S. 324, 364 (1977), and their progeny: to fashion the most complete relief possible and to eliminate the effects of past discrimination, the "last vestiges of their discriminatory practices." Albemarle, supra, at 417-418.

In the pension context, these principles have been limited by

catastrophic economic impact: the huge burden on a State's pension plan and the financial undermining of its fund by the imposition of a retroactive award.[8]

But this is not a pension case and there is no "fund" based on sick leave credits. The limitations imposed by Manhart, Norris, and Long on retroactive awards which undermine an actuarially-accumulated pension fund have no applicability here. The basic Albemarle principles of make-whole should apply. See also Newport News, supra, 462 U.S. at 685, note 26: the extra cost of equalizing health insurance benefits is no justification or defense to a Title VII discrimination charge.

Read literally, the decision below

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8 Calculated in Norris as between $817 million to $1.26 billion annually for 15-20 years.

would itself undermine all Title VII precedents where back pay, front pay, and other monetary awards are made. The Court stated, Appendix 124a,"The Long court, by implication, also prohibited retroactive awards that would burden the State or a private employer with additional financial obligations."

Certainly the Long decision should not be read so broadly, as to in effect rewrite Title VII and eliminate all financial burdens of a retroactive nature on any employer. This startling and dangerous misinterpretation of Long by the Second Circuit makes it that much more obvious that Long's precepts should not be a fortiori extended beyond the pension context.

Long, As Well As Norris and Manhart, Applies To Pensions Only

Of course there is a tendency to sweep broadly with a new broom, especially one formulated by this Court. But there is no rational basis for applying the limitations of a pension case to a non-pension case. And the purposeful decision in Long clearly can only be applied to pensions, not to other fringe benefits of retirement.

On a purely mechanical level, the Long decision makes reference to "pensions" 50 times. The rationale of the decision is specifically keyed to pensions and pension funds: to the "basic financial calculus of a pension plan..."

As analyzed in 67 Washington U.L.Q., 643, Recent Developments, Florida v. Long: Clarification of Retroactive Relief in Title VII Pensions Cases, at 644 note 14:

> Long involved defined benefit plans. A defined benefit plan is one that provides benefits according to a predetermined formula. Employer contributions are computed each year based upon an actuarial estimate of how much must be contributed over the working years of all employees in order to fund their expected benefits.

There is nothing like that here. No rationale is stated by the Court below for making the Long precepts applicable here, rather than using the basic Albemarle and Bazemore principles,[9]

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9 A further reason not to apply Long out of context is the impact on this Court's decision in Long of the Florida nondiscriminatory pension scheme. Florida always gave equal pension benefits to male and female retirees; it was in the optional plan that there was a disparity in the pension amounts. This is indeed a type of disparity that might not have been clearly seen after Manhart. The Long court recognized this, 487 U.S. at 234:

> Before Norris, Florida

> could conclude reasonably that, once employees were offered a unisex primary benefit, Manhart did not prevent the offering of sex-based annuities as options. The alternative for employers who wished to control, or were unable to finance, the costs of unisex options would be to eliminate optional benefits entirely and offer the primary benefit alone. See Hagar and Zimpleman, 32 Drake L.Rev., at 938-939. Employees do not benefit from the reduction of their pension plan options, and Florida may have assumed we did not intend to eliminate an employee's flexibility in choosing a retirement option, so long as the options presented included a sex-neutral benefit.

In fact, 487 U.S. at 235, "Florida's offer of the nondiscriminatory [primary] benefit makes its case against retroactivity more compelling..."

No such alternative plan was available here; thus here an award of retroactivity is "more

bolstered by the Newport News holding.

No Fund

This is a simple and modest health insurance scheme providing a few dollars a month to help a retiree pay for his dependent's health insurance premiums. It is not a pension: its only relationship to a pension is that the premiums charged for health insurance are one of the possible deductions, like federal withholding tax, from a fixed pension monthly allowance. Neither the premiums charged, nor any reduction in premiums allowed by a sick leave credit, changes the fixed pension. If a retiree chooses not to purchase state-sponsored health insurance for dependents, see Civil Service Law 163.2, or has no dependents, there would be no charge and no deduction

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compelling."

from the monthly allowance. Likewise, a retiree may or may not choose to have federal tax withheld from his monthly pension allowance.

The entire health insurance scheme is not "funded" in the sense that a pension plan is "funded": an annual appropriation is made to cover all charges not paid for by employees: the 100% of premiums for employees and retirees, the 75% of premiums for dependents of employees and retirees, and the sick leave credit allowance. Sick leave credits are not "funded" in any way: no monies are put away, either annually or at the time of retirement, as a "fund" from which the credits are paid out. The credits simply come out of the annual appropriation covering all other health insurance costs.

Nor is there any fixed level of benefits anticipated. Various factors will affect the amount a retiree has to pay for health insurance: a dependent may reach an age where he is no longer covered, or may die; the premium charged may change whenever the State signs a new contract with a health care insurer. Thus the cost to the retiree is fluctuating. There is no "fixed calculation based on assumptions that both the State and the retiree held..." Long, 487 U.S. at page 238, no finite amount of money, no "deficit" in an actuarially-derived fund and no challenge to "a fixed level of payments..." (Long at pages 238-240).

As to the "colorable contractual right to their current level of benefits" attributed by the Circuit decision, Appendix127a, to male retirees, New York

courts have previously decided that issue adversely. The New York Court of Appeals held, in Lippman v. Board of Education of the City of Sewanhaka, supra, that "there was no contract, express or implied, by respondent Board of Education to reduce its contribution to payment of health insurance premiums of retired employees and their dependents." 496 N.Y.S.2d at 988. Health insurance benefits are neither protected by the constitution nor by contract from being reduced by a smaller employer contribution. Although a pension allowance is a protected contractual benefit which cannot be diminished or impaired, a change in the charge for or contribution to health insurance premiums is not a retirement benefit. Indeed the contrary is true: the Health Insurance Program Manual provides

for unilateral adjustments in the rate of contributions.

Nor is there any impairment of the obligations of contracts, since there was no "investment-backed expectation" of the sums to be used to offset health insurance premiums. Compare Pineman v. Fallon, 842 F.2d 598 (2d Cir.) cert denied 109 S.Ct. 72 (1988).

Sick leave accruals are not in any way actuarial. They are purely personal to an individual employee-- essentially the end product of an employee's health needs. Likewise no actuarial assumption is used to convert sick leave days to a dollar amount. Only after that conversion was an actuarial calculation made-- only after the dollar amount was calculated: clearly not a past actuarial assumption. The use of actuarial tables at this stage

was by administrative fiat of the Department of Civil Service-- a purely arbitrary decision which became, after the awareness of the Department of the discriminatory aspects of such use, both arbitrary, capricious, and without warrant in law. There is nothing in the record to support the conclusion of the Court below that the use of the tables was "objective." Indeed, the use of separate sex tables was without "real and substantial relation to the object sought to be obtained...", said in Ingraham v. Wright, 525 F.2d 909 (5th Cir. 1976) aff'd 430 U.S. 651 (1977), in a substantive due process context; it is not rationally related to a legitimate government interest.

Since there is no fund to be depleted, there is an even stronger

reason here than in Spirt v. TIAA-CREF, 475 F.Supp. 1298 (S.D.N.Y. 1979), aff'd in part 691 F.2d 1054 (2d Cir. 1982), (Spirt I), vacated and remanded 463 U.S. 1223 (1984), modified and affirmed on remand, 735 F.2d 23 (Spirt II), cert. denied 105 S.Ct. 247 (1984), to invoke the make-whole provisions of Title VII: this is indeed "a different case, and a different assessment of retroactivity..." Long, at page 240.

Health Insurance Benefits Are Not Retirement Benefits

New York State's courts have specifically held State health insurance benefits to be distinct from retirement benefits, saying, Lippman v. Board of Education of the Sewanhaka, supra, 66 N.Y. 2d at page 318:

> [T]he only relation between health benefits and retirement benefits is

> the purely incidental one that the latter provides the means by which the former is paid in those instances where the employer has elected to pay less than the full premium.

The New York Court of Appeals firmly rejected the notion that "other employment conditions" such as health insurance premiums were within the "benefits of membership in a retirement system." Id.

The decision of the Appellate Division, 104 App.Div.2d 123, 483 N.Y.Supp.2d 446, 448 (1984), affirmed by the Court of Appeals in the cited case, also stated that the method of contribution to the health insurance premium has "no impact on the manner of calculation of retirement pensions." Accord, McDermott v. McDermott, 119 App.Div.2d 370, 507 N.Y.Supp. 2d 390 (1986); compare Poggi v. City of New

York, 109 App.Div.2d 265, 491 N.Y.Supp.2d 331 (1985), aff'd on other grounds 67 N.Y.2d 794, 501 N.Y.Supp.2d 324 (1986).

Clearly then this matter does not address a pension, a pension plan or system, or a fixed pension fund. There is no rational basis stated for placing a health insurance plan under the Long pension rubric.

The decision below used the factors set forth in Long to affect the question of retroactivity in a pension case as "instructive in a variety of factual contexts" and concluded that, using the Long analysis, retroactive relief was "inappropriate under the circumstances" presented in this case. (Appendix 102a)

It is urged that this approach sweeps too broadly and unnecessarily takes a decision which should be narrowly

construed to the far reaches. In doing so, the Court below has gone dangerously far and in a manner and fashion which would in effect repeal Title VII. Instead of applying strictly to the pension context, the court below would apply Long to all contexts-- a result hardly intended by Manhart and its progeny.

Equity

The Court sitting in Title VII is enjoined to do equity. Equity in this context must provide for make-whole relief for the past inequity, qua wrong, and non-perpetuation of the inequity, qua wrong, in the future. There are no special factors that make an award of relief, both retroactivity and prospectively, inequitable. Compare Long, opinion of Blackmun, J., at page 246;

opinion of Stevens, J., at pages 248-249.

Indeed, there is a greater inequity in the outcome below, not just for petitioner and the petitioner class but for other potential Title VII litigants. The elimination of the retroactive remedy

> may very well deter individuals currently suffering ongoing forms of impermissible employment discrimination in similar contexts from bringing actions to enforce their rights. Cf. Association Against Discrimination in Employment, Inc. v. Bridgeport, 647 F.2d 256, 279 (2d Cir. 1981), cert. denied, 455 U.S. 988, 102 S.Ct. 1611, L.Ed.2d 847 (1982) (in fashioning Title VII relief under 42 U.S.C. section 2000e-5(g), consideration should be given to complainants and those similarly situated).

State v. Commission on Human Rights, supra, 559 A.2d at 1130. The Connecticut Court, unlike the Circuit below, considered that "applying the 'retroactivity' analysis of the Manhart, Norris, and Long Title VII pension

decisions" would create "a greater 'inequity.'"

POINT II

THE STATE HAD NOTICE, PRIOR TO AUGUST 1, 1983, OF THE ILLEGALITY OF THE USE OF SEX-BASED ACTUARIAL TABLES TO CALCULATE TERMS AND CONDITIONS OF EMPLOYMENT

Petitioner's basic position, see Point I, is that the pension case principles have no applicability to this non-pension situation. Nevertheless the Circuit Court and District Court below have focussed upon the analysis in Long, particularly on the question of notice. Following the pension cases for notice principles, New York State must be held to have had pre-Norris notice of the illegality of its disparate treatment of women retirees vis-a-vis health insurance premiums.

When the State became a covered employer under the 1972 amendments to Title VII, it became obligated to end discriminatory practices. "State governments were charged with the duty to reformulate their thinking in this area and to avoid committing 'unlawful discriminatory practices,' if such existed." It was made "encumbent upon State and local governments to immediately reappraise their employment practices, to be certain that they conformed with the amended federal law." Fitzpatrick v. Bitzer, supra, 390 F.Supp. at 280, 285. The District Court there awarded prospective relief, to equalize male and female pension benefits which had been computed by use of separate actuarial tables. The award was affirmed

by the Second Circuit and by this Court.[10] Other federal district and appellate decisions likewise provided notice of the impropriety of the use of sex-segregated actuarial tables. See, e.g., Spirt v. TIAA-CREF, supra, and Manhart v. City of Los Angeles, 387 F.Supp. 380 D.Cal. 1975) aff'd 535 F.2d 581 (9th Cir. 1976).

Indeed in a brief to the Circuit the State has admitted that it had such notice by virtue of the Manhart decision. Such notice is logical since the Manhart "open-market exception" of course had no application to New York State's scheme or plan and did not involve third party insurers. See Long,

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10 The complex history of this case is set forth in footnote 10, page 1129, in State v. Commission on Human Rights, 211 Ct. 468, 569 A.2d 1120 (1989).

supra at pages 243-244, Blackmun, J. concurring in part and dissenting in part.

While Fitzpatrick, Spirt, and Manhart were all pension cases, they provided notice of the basic legal proposition that, under Title VII, the use of sex-segregated actuarial tables in the computation of terms and conditions of employment was illegal-- that is, the use of such was not a defense to sex-challenged discriminatory practices. Indeed the State of New York had an independent notice from its own courts that sex discrimination in health insurance benefits was forbidden:

As of 1965, discrimination based on sex in the terms and conditions of employment was forbidden by New York State law. Human Rights Law, Executive

Law section 296.1(a). In an action brought under that statute by a State employee whose health insurance benefits discriminated against women, the State Department of Civil Service, a named defendant here, was ordered to cease offering terms and conditions in its health insurance program less favorable to women. New York State Civil Service v. New York State Human Rights Appeal Board, 66 App.Div. 2d 309, 414 N.Y. Supp.2d 46 (1979). That decision put the State, and particularly the Department of Civil Service, on notice that sex discrimination in its health insurance program was unlawful[11] and that the State

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11 The particular program that discriminated was pregnancy-related. See Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983), discussing the Pregnancy Discrimination Act Amendment to

should accordingly seek out and root out "the last vestiges of their discriminatory practices." Albemarle Paper Co. v. Moody, supra, 422 U.S. at 417-418. As well, Fitzpatrick v. Bitzer, supra, warned states to "immediately reappraise their employment practices," 390 F.Supp. at 280.[12] The warning was

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Title VII. Thus, as to the issue under the New York statute, Title VII did not substantially differ from state law, certainly insofar as health insurance benefits for males and females were concerned, pregnancy-related or in general.
The Circuit's attempt to distinguish the impact of the cited State case on the grounds that it came under state law and related solely to pregnancy is sophistical.

12 The impropriety of the use of sex-segregated tables in the health insurance premium reduction calculation-- this very case-- was also brought to the attention of the Department of Civil Service in 1981, by

particularly apt for New York, one of the states within the Second Circuit.

Certainly, this Court's decision in Manhart put the State on notice that, at the minimum, the use of unequal contributions based on actuarial tables in the calculation of the terms and conditions of employment was not permissible. That the situation here is one of unequal contributions is indisputable. See, Feinberg, J., concurring in the decision below; Graham v. State of New York, supra, 653 F.Supp. at 1370. See also Black's Law Dictionary and Webster's Third International Dictionary for their definitions of "contributions" and "benefits", and 67 Washington U.L.Q. 642, supra. New York's own courts have recognized that the

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the plaintiff here.

health insurance scheme at issue here is defined as a "contribution" plan. Lippman v. Board of Education, supra.

Even in the District Court decision below deciding that the health insurance plan, sub judice, was a "benefit" and not a "contribution," 716 F.Supp. at 802, there were frequent references to "contributions." See, e.g., 716 F.Supp. at 803: "the State computes the monthly contributions"; the tables "produced lower monthly contributions for women"; page 804: plaintiffs seek an "award of the difference between the contributions paid on their behalf and those paid for retired male employees." (Emphases added)

The actual language of Civil Service Law section 167.4, the statute which creates the sick leave/health benefit scheme, is conclusive: the State

determines the dollar value of an employee's unused sick leave, then:

> In addition to regular employer contributions, contributions in the amount of such monthly installments shall be paid from the state's appropriation to the health insurance fund and applied towards the charges for health insurance on account of such retired employee and his dependents, to the extent necessary to pay such charges. The remaining amount, if any, necessary to pay such charges shall be contributed by such retired employee. On or after October first, nineteen hundred seventy when such dollar value of such sick leave amounts to less than one hundred dollars for a particular retired employee, in lieu of contributions which would otherwise be required from such retired employee, additional contributions shall be paid from the state's appropriation to the health insurance fund and applied towards the charges for health insurance on account of such retired employee and his dependents until the sum of such additional contributions equals such dollar value of such sick leave.[13] (Emphases added)

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13 There is no mention of "benefits" in the section.

Patently, the "contribution in the amount of such monthly installment" was lesser for women than for men at that time before 1983 when the actuarial equivalent was based on sex-distinct tables. Likewise, the remaining amount that had to be contributed by the retiree was greater for a woman than for a man whose sick leave credits went farther. The statute language of course is entitled to great weight in any analysis of the statutory scheme and in any conclusion ultimately based on a contribution/benefit analysis.

The language of section 167.4, defining the health program in contribution terms, should be considered conclusive on the State of New York for it is the State's own enabling statute. The Second Circuit's discussion, Appendix

111a, of the "ambiguities inherent in characterizing the State's practice in this case as a benefit or contribution" is simply wrong in light of the statutory language and, as Judge Feinberg noted in his concurring opinion, its actual operation. There is no statutory or operative ambiguity and the State must, in good faith, be bound by the statutory language calling the health benefit plan, unequivocally, a contribution.

For analysis of the scheme herein, therefore, there was simply no good reason to engage in the contribution/benefit dichotomy in adjudication of the petitioners' legal rights. Contributions and benefits here interface: one makes a contribution to achieve a benefit. The contribution is unequal so the benefit is likewise

unequal. In the Manhart pension context the amount contributed to the pension fund by men and women was deliberately calculated unequally so they could get the same money in retirement. In the Norris pension context, in contrast, the State put in the same amount for each sex to the fund, but the money or "benefit" was distributed in smaller amounts for women.[14] Here, there was a direct ratio: smaller contributions for women meant smaller benefits for women. The contribution was smaller because of the way the State made the contribution. Clearly a contribution/benefit dichotomy, valid in the pension context, has no logical usefulness in this non-pension context. The State's vaunted "good faith"

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14 Recent Developments, supra, page 643 note 4.

conclusion that the scheme was a benefit cannot be dispositive here in this non-pension context.

Petitioner's notice arguments are well-stated by the Connecticut Supreme Court in State v. Commission on Human Rights, supra, at page 1129: the Fitzpatrick v. Bitzer decision "sufficiently alerted the [State] to the illegality of its gender-based pension computation method." The State of New York was, similarly, alerted to this same illegality by the same Bitzer district court decision, as affirmed by the Second Circuit and by this Court.

Beyond the question of notice is the principle that, for a decision to be applied nonretroactively, it must "establish a new principle of law." Chevron Oil Co. v. Huson, 404 U.S. 97

(1971). Manhart, Fitzpatrick, Spirt, "foreshadowed" the Norris total ban on use of segregated tables and did not come under the "new principle of law" rubric. See Long, Blackmun, J. concurring in part/dissenting in part, at page 246.

Indeed, the new principle was statutory, not imposed by decision; Manhart and its progeny did not make new law: they carried out the statutory mandate to eliminate sex discriminatory practices. The use of sex-segregatory tables in calculating terms and conditions of employment clearly fell under the statutory ban.

The Decision Below

The call to reexamine and eliminate the last vestiges of sex discrimination, by the enactment of the 1965 State Human Rights Law ban on sex discrimination, by

the 1972 inclusion of States in the Title VII ban on sex discrimination, by the various courts around the country holding that the use of sex-segregatory tables to create unequal terms and conditions of employment was illegal, and New York's own courts' warning to the very agency here involved that its health insurance scheme could not discriminate against women, all served to put the State clearly on notice that it could not use sex-segregatory tables in calculating women's terms and conditions of employment. The State's failure to reexamine its various programs can better be called a head-in-the-sand attitude rather than a "good faith conclusion,"[15]

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15 Reexamination should have caused the State in good faith to look at the language of "contribution" in its enabling act, section 167.4, even if it

as the Court below stated. (Appendix 111 a)

The failing of the Circuit's reasoning also extends to its discussion concerning the impact of Fitzpatrick v. Bitzer, supra. That case involved the use of sex-segregatory tables, as the Connecticut Supreme Court in State v. Commission on Human Rights, supra, stated: Fitzpatrick gave "fair warning that... the use of gender-based tables to compute retirement benefits constituted a violation of Title VII..." The case became finalized in 1976, and was not "wending its way" through any appellate process by 1978, when the petitioner class begins.

It is a total non-sequitur that

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indeed was limiting its reexamination only to Manhart-type situations.

actuarial tables were used in Connecticut because of a "cultural stereotype"[16] and used in New York because of "accurate statistics that reveal an actual disparity in the lifespans of men and women."[17] The bottom line is the same:

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16 There is no record basis for the Court below's discussion of the Connecticut statute as based on "cultural stereotypes": The Fitzpatrick court itself stated, 390 F.Supp. at 282, that there was "no legislative history which might more fully explain the reasons...[for the] retirement age priority for the benefit of women." And the Connecticut attorney general argued that there was an entirely different-- an objective-- reason. See page 285.

17 There is perhaps a naivete at work here in describing the use of sex-segregated tables as objective. The very decision to keep statistics by sex reveals another "cultural stereotype." Longevity of women over men varies according to time and place. Until the advent of modern birth control methods,

use of sex-separate tables produced a sexually-based disparity in the treatment

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men had a longevity advantage over women.

Clearly the decision to keep statistics separately for any groups is a culturally-based decision. As an example, race-separate statistics could be used to disadvantage members of one race or another. Thus the decision (an insurance industry decision, not governmentally sanctioned but merely adopted) to keep separate sex, or separate race, or separate any other groups, statistics is suspect in terms of the original possibly stereotypical reasons for such decision.

The subject was discussed in 49 U.Chi.L.R. 489, The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited, at page 513. The author questions whether "these [separate sex] data are likely to have been contaminated by unfairly stereotyped beliefs about men and women, whether alternative measures of life expectancy could be used..., and whether the use of sex-distinct annuity tables is likely to perpetuate unfair stereotypes and to limit the opportunities for women."

of men and women.

The analysis made by the D.C. Circuit in Thompson v. Sawyer, 678 F.2d 257 (D.C.C. 1982) and McKenzie v. Sawyer, 684 F.2d 62 (D.C.C. 1982) is more pertinent to this case than the analysis of the Second Circuit as to the effects of notice. There, an award of back pay to individuals under Title VII began in August 1969, the date when the defendant federal agency had been ordered to end discrimination in general, by Executive Order, although the federal government was not made subject to the provisions of Title VII until 1972 when Title VII was amended. The Executive Order put the GPO on clear notice that it should "have taken steps to end discrimination within its work force." The general order created "an obligation to shed

discriminatory practices." 678 F.2d at 287, 291.

Certainly the State, at the minimum, should have ended the discrimination for the class when it ended discrimination for post-Norris retirees. Instead, it perpetuated past discrimination, condemned in Bazemore v. Friday, 478 U.S. 385 (1986).[18]

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18 "The error of the Court of Appeals with respect to salary disparities created prior to 1972 and perpetuated thereafter is too obvious to warrant extended discussion: that the Extension Service discriminated with respect to salaries prior to the time it was covered by Title VII does not excuse perpetuating that discrimination after the Extension Service became covered by Title VII... While recovery may not be permitted for pre-1972 acts of discrimination, to the extent that this discrimination was perpetuated after 1972, liability may be imposed." 478 U.S. at 394, Brennan, J.,

As Stevens, J., dissenting in Long, stated at page 248, failure to "top-up" future benefit payments is akin to the perpetuation of past discrimination that occurred in Bazemore.

This is the context within which the second Long analysis factor, deterrence, must be viewed: not what the State did do to equalize benefits, but what the State did not do, to end past discrimination rather than perpetuating the class discrimination into the future. This is a concrete illustration of the good faith principle.

CONCLUSION

This Court had made a logical and defensible decision in Florida v. Long not to apply normal Title VII

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concurring in part.

principles in the pension context. The Court below has nevertheless impermissibly expanded the Long reasoning to apply to an undefined "variety of factual contexts." The reductio ad absurdum of such a far-reaching decision in effect rewrites all Title VII principles.

Title VII itself put employers on notice that they could not continue to use practices that resulted in discrimination, and that they might be responsible for retroactive and prospective monetary amounts to make their employees whole for the financial damage they incurred because of the employers' practices.

It cannot reasonably and fairly be viewed as equitable that an employer is permitted forever to continue a financial

disparity between men and women, particularly when such disparity was specifically brought to the employer's attention in a timely manner.

Likewise, it cannot reasonably and fairly be said that an employer who failed to take action when a male-female disparity was called to its attention and who, when eliminating future disparities, failed to eliminate that disparity for an entire class of women, entered into a "prompt and voluntary compliance with the law."

By this decision, New York has been permitted to continue an unfair sex discrimination which it knew or should have known was unlawful. Such is not a "just result" in the circumstances of this case.

The grant of certiorari here would

clarify the limited nature of the Long holding and the uniqueness of the pension cases.

Certiorari is also needed to reconcile the disparate holdings of the Connecticut Supreme Court, which would narrowly construe Long, and the Second Circuit which would apply Long to all kinds of inappropriate contexts.

The direct conflict between the Second Circuit decision and the Connecticut Supreme Court decision in State v. Commission on Human Rights, supra; the Circuit's decision to extend and broadly apply Long in a non-pension context, without rationale therefor; and the conflicts between the Circuit's decision and this Court's decisions in Albemarle and Bazemore; as well as the direct conflict between the Circuit's

reasoning and the holding of the New York Court of Appeals in Lippman v. Board of Education, all are special and important reasons for a favorable grant of the writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADELE GRAHAM et ano., etc.,

Plaintiffs,

- against -

STATE OF NEW YORK, DEPARTMENT OF CIVIL SERVICE, et al.,

Defendants.

84 Civ. 4546 (WCC)

AMENDED OPINION

CONNER, D. J.

The Opinion and Order in the above-captioned case, dated February 17, 1986, is hereby amended nunc pro tunc as follows:

Page 1 - Cover Page - 2nd line from the bottom should read: 120 Broadway, New York, New York 10271.

SO ORDERED.

William C. Conner,
United States District Judge

Dated: New York, New York
February 19, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADELE GRAHAM and TAMAARA DANISH, individually and as representatives of a class of persons similarly situated,

Plaintiffs,

- against -

STATE OF NEW YORK, DEPARTMENT OF CIVIL SERVICE; EDWARD V. REGAN, as Comptroller of the State of New York; MARIO CUOMO, as Governor of the State of New York,

Defendants.

84 Civ. 4546 (WCC)

OPINION AND ORDER

A P P E A R A N C E S :

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CONNER, D.J.:

Upon retirement, an employee of the State of New York ("the State") receives from the State a monthly credit toward the cost of his health care insurance based on the amount of accumulated-but-unused sick leave he had at the time he retired. The amount of this monthly credit is fixed at the time of the employee's retirement, and is paid to him for the remainder of his lifetime. In calculating the amount of the credit, the State uses actuarial tables to determine

the retiree's remaining life expectancy. It currently uses unisex actuarial tables to make this calculation, but prior to August 1, 1983, it used sex-based actuarial tables to do so.

Plaintiff Adele Graham ("Graham") retired from her position as a staff attorney in the State's Division of Human Rights in 1981. She brought this action against the State and certain state officials alleging that the use of sex-based actuarial tables prior to August 1, 1983 violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000e to 2000e-17 (1982), the Civil Rights Act of 1871, 42 U.S.C. section 1983 (1982), the fourteenth amendment to the United States Constitution, and article I, section 11 of the New York Constitution. She

proposes to represent a class of female employees who retired prior to August 1, 1983, and seeks on their behalf a retroactive award of the difference between the credits they have received and the credits their male counterparts have received.[1]

I suggested to the parties that before they litigate the issue of whether a plaintiff class should be certified, they address the potentially dispositive issue of whether the proposed class is

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1 Tamaara Danish also sued as a class representative. However, she has not yet retired from civil service and the State has stopped using sex-based actuarial tables to calculate the credit at issue here. Accordingly, the parties agree that Danish has not been affected by the State's previous practice and she has apparently abandoned her claim. See Plaintiffs' Memorandum of Law in Support of the Doctrine of Retroactivity at 7.

entitled to the retroactive relief Graham seeks on its behalf. Because the parties agreed that this issue is essentially one of law, I further suggested that they stipulate to a statement of agreed facts and cross-move for summary judgment. The parties endorsed this suggestion in a status conference before me on December 19, 1986, further agreed to: (1) stipulate to the remaining issues of identification and certification" of an agreed class; (2) stipulate to the dismissal of any unnecessary defendants; and (3) submit the amended affidavit of Thomas McCracken from which the parties can calculate the retroactive benefits due. Defendants have indicated that by proceeding in this manner, they do so without prejudice to their right to pursue other defenses raised in their

answer. (See Defendant's letter dated December 23, 1986.) It appearing that no question of fact remains to be resolved at trial, the parties' submissions to date should be treated as a motion for summary judgment.

For the reasons stated below, I conclude that plaintiff and the class she proposes to represent are entitled to the retroactive relief she seeks, at least in part as described below. Accordingly, plaintiff's motion for summary judgment is granted and defendants' cross motion for summary judgment is denied.

Background

New York Civil Service Law section 163 provides that a retired employee of the State of New York is eligible to participate in a health insurance plan established for state employees. Pursuant

to Civil Service Law section 167, the State makes contributions toward the cost of this health insurance, and the retired employee pays the balance through deductions from his retirement allowance.

Section 167(4) provides that, in specified circumstances, a retired employee's contribution toward the cost of the health insurance may be reduced or eliminated as a result of sick leave accrued but not used at the time of the employee's retirement. Section 167(4) provides in relevant part:

> the department of civil service shall determine, based on the employee's age at the time of retirement, the actuarial equivalent in monthly installments for the remaining life expectancy of such retired employee, of the dollar value of the earned and accumulated but unused sick leave standing to his credit at the time of retirement, without interest. Such dollar value shall be based on the employee's salary at the time of retirement. In addition to regular

> employer contributions, contributions in the amount of such monthly installments shall be paid from the state's appropriation to the health insurance fund and applied towards the charges for health insurance on account of such retired employee and his dependents, to the extent necessary to pay such charged. The remaining amount, if any, necessary to pay such charges shall be contributed by such retired employee.

N.Y. Civ. Serv. Law section 167(4) (McKinney 1983).

In accordance with this provision, the Employee Insurance Section of the State Department of Civil Service makes the following calculations when an employee retires with unused sick leave. First, the Department calculates the dollar value of the employee's unused leave by the employee's daily rate of pay at the time of retirement. If this dollar value is greater than $100, the Department calculates an actuarial

equivalent in monthly installments by dividing the dollar value of the unused sick leave by the number of months in the employee's remaining life expectancy, as indicated in the Department's actuarial tables.[2] The State then contributes this monthly installment toward the employee's insurance plan premiums in addition to the State's ordinary contribution. Thus, in effect, the employee receives a credit against his health insurance costs for his unused sick leave.

Prior to August 1, 1983, the Department calculated the monthly installment by using sex-based actuarial tables. These tables showed longer life expectancies for women than for men, and

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2 Where the dollar value of an employee's unused sick leave is less than $100, the State does not calculate an actuarial equivalent.

therefore produced lower monthly credits for women. However, on August 1, 1983, the Department began to use unisex actuarial tables to calculate the monthly credit in order to comply with the Supreme Court's decision in Arizona Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) (per curiam). In Norris, the Court held that Title VII prohibits an employer from offering a retirement plan that awards a woman lower monthly benefits than a man who has made the same contributions, even though sex-based actuarial tables indicate that, as a group, women live longer than men. In effect, the Court barred the use of sex-based actuarial tables in calculating employee retirement benefits.

The Court held that it would impose only prospective liability for the violation in Norris, and directed the Clerk of the Court to issue judgment on August 1, 1983, some three weeks after the date of the Court's opinion. Id. at 1075. The State of New York concluded that Norris required it to terminate its use of sex-based actuarial tables in calculating the monthly credits for unused sick leave. However, the State apparently also decided that the Court's decision to impose only prospective liability did not require it to adjust retroactively the monthly credits of women who retired prior to the effective date of the Court's decision. Accordingly, the State did not and has not done so.

Even though the Supreme Court held

that it was inappropriate to impose retroactive liability in Norris, Graham contends that it should be imposed here because the State knew or should have known that its use of sex-based actuarial tables violated Title VII long before Norris was decided. In particular, she argues that the Supreme Court's decision in City of Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978), put the State on notice in 1978 that its practice of using sex-based tables was improper.[3] Graham suggests

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3 Alternatively, Graham argues that Judge Ward's decision in Spirt v. Teachers Ins. and Annuity Ass'n, 475 F.Supp. 1298 (S.D.N.Y. 1979), aff'd in part, rev'd in part, and remanded, 691 F.2d 1054 (2d Cir. 1982), vacated and remanded, 103 S.Ct. 3566 (1983), decision on remand, 735 F.2d 23 (2d Cir. 1984), cert. denied, 105 S.Ct. 247 (1984), or our court of appeals' first decision in

that the most appropriate means of remedying the State's alleged violation of Title VII is to adjust retroactively the monthly credits of women who retired between the date Manhart was decided and the date Norris became effective to match the credits received by similarly situated men who retired during the same period. For the following reasons, I agree with Graham that Manhart put the State on notice that its use of sex-based actuarial tables was illegal and is entitled to the retroactive relief she seeks, with one qualification discussed

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Spirt put the State on notice in 1979 or 1982 that its practice was improper. Because I conclude below that Manhart made clear that the State's policy was illegal, I need not and do not agree whether these subsequent lower court decisions also served to put the State on notice.

below.

Discussion

1. The Legal Context

In order to put the issues of this case in context, it is necessary to examine the Supreme Court's decision in Manhart and Norris in greater detail. In Manhart, the Supreme Court considered the validity of a pension plan operated by the Los Angeles Department of Water and Power for its employees. The plan was funded entirely by contributions from the Department and its employees; no insurance company was involved in administering the plan or paying benefits. 435 U.S. at 705. Upon retirement, each employee received a lifetime monthly benefit computed as a fraction of his salary multiplied by his years of service. Similarly situated men

and women received equal monthly benefits, but because actuarial tables showed that women generally live longer than men, the Department required that women make larger contributions to the plan than comparable male employees.

The Supreme Court held that the Department's plan violated Title VII. It ruled that an employer cannot require a woman to pay larger contributions to an employer-run retirement plan in order to receive the same benefits given to a man of the same age, seniority, and salary. The Court acknowledged that "as a class women live longer than men," but emphasized that Title VII focuses "unambiguously" on the individual, and precludes employers from treating "individuals as simply components of a racial, religious, sexual or national

class." Id. at 708.

The Court concluded that by using sex-based actuarial tables, the Los Angeles Department unlawfully treated its female employees as components of a sexual class rather than as individuals; the Court stated that the Department had attributed a characteristic true of women as a group-- that they live longer than men-- to all women in its employ, regardless of whether they would come to share that characteristic or not. Id. The Court noted that the Department could not know before or at the time of retirement which individual female retirees would in fact live longer than the average male retiree. Id. Thus, the Court concluded that the Department's practice of requiring all female employees to make larger contributions than all male

employees discriminated against those female employees who did not actually live longer than the average male retiree. The Court stated that this practice violated Title VII because it could "not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" Id. at 711 (footnote omitted) (quoting Developments in the Law-- Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L. Rev. 1109, 1170 (1971)).

After concluding that the Department's practice violated Title VII, the Court turned its attention to fashioning an appropriate remedy. The Court stated that in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), it had

created a presumption in favor of retroactive liability in order to make the plaintiff whole. 435 U.S. at 719. However, the Court concluded that two factors made retroactive liability inappropriate in Manhart. First, it noted that there had been wide disagreement as to whether the use of sex-based actuarial tables in calculating pension contributions and benefits violated Title VII. Id. at 720. Second, it cautioned that retroactive liability might endanger the solvency of many employer-sponsored pension plans. The Court indicated that it feared that plan administrators had not foreseen the possibility that the legal rules governing the plans might change, and the plans therefore might not be financially able to adjust to the new rules. Id. at 721-723. In light of these

factors, the Court held that liability should not be imposed retroactively, and remanded the case to the lower courts to fashion a revised award.

The Court was careful to state the limits of its holding. It emphasized that

> [a]lthough we conclude that the Department's practice violated Title VII, we do not suggest that the statute was intended to revolutionize the insurance and pension industries. All that is at issue today is a requirement that men and women make unequal contributions to an employer-operated pension fund. Nothing in our holding implies that it would be unlawful for an employer to set aside equal retirement contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market.

Id. at 718 (footnote omitted) (emphasis added).

The Court did not turn its attention to these issues again until six years later when in Norris it assessed the

legality of a deferred compensation pension plan offered by the State of Arizona to its employees. Unlike the plan at issue in Manhart, the plan in Norris was not operated by the employer itself; instead, several private companies selected by the State administered the calculation and payment of benefits. These companies offered a variety of investment options to the state's employees, and each employee selected the option that best suited him. After an employee had selected the option he desired, the State simply withheld the appropriate sum from the employee's wages and channelled that money to the appropriate company.

Among the investment options available under the plan was a lifetime annuity. All of the companies selected by

the State to participate in the deferred compensation plan used sex-based actuarial tables to calculate annuity benefits. Because these tables showed that, as a group, women live longer than men, the companies paid smaller annuity benefits to women than to men who deferred the same amount of compensation and retired at the same age. A female employee brought suit contending that the companies' use of sex-based actuarial tables in calculating annuity payments violated Title VII.

Norris presented two issues left unresolved in Manhart. First, the Supreme Court had stressed in Manhart that the plan in question there had required women to make higher contributions than men in order to receive the same benefits. The Court did not address whether a plan that

required equal contributions, but paid women lower benefits than similarly situated men, would violate Title VII. Since the plan in Norris was voluntary, it did not require women to make higher contributions than similarly situated men if they did not choose to do so. But if women did make equal contributions, they received lower annuity benefits than men during retirement.

Second, the Court had stressed in Manhart that its holding was limited to "employer-operated" pension plans. It stated that it expressed no view as to whether an employer would violate Title VII by withholding equal contributions from men and women and letting its employees invest those sums on the open market. Norris did not pose exactly that situation, since the plan there did not

permit employees to invest their contributions on the open market, but only in investment opportunities selected by the employer. Nonetheless, the plan in Norris was significantly different from the plan in Manhart in that is was operated by private companies and only sponsored by the employer.

The Supreme Court divided sharply on the case, but there was little disagreement on the first issue-- whether Title VII prohibited an employer from offering a plan that required equal contributions from men and women, but paid women lower benefits than men. Justice Marshall, in an opinion joined by Justices Brennan, White, Stevens, and O'Connor, stated:

> We have no hesitation in holding, as have all but one of the lower courts that have considered the question, that the classification of employees

> on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage... If a woman participating in the Arizona plan wishes to obtain monthly benefits equal to those obtained by a man, she must make greater monthly contributions than he, just as the female employees in Manhart had to make greater contributions to obtain equal benefits. For any particular level of benefits that a woman might wish to receiver, she will have to make greater monthly contributions to obtain that level of benefits than a man would have to make. The fact that Arizona has offered a range of discriminatory benefit levels, rather than only one such level, obviously provides no basis whatsoever for distinguishing Manhart.

463 U.S. at 1081-82 (footnotes omitted) (Marshall, J., concurring in the judgment in part). The balance of the Court, while taking issue with the rest of Justice Marshall's opinion, did not challenge this conclusion.

On the second question, whether Title VII was limited only to "employer-

operated" pension plans, Justice Marshall wrote for the same majority. The Court held that since the State of Arizona had selected the private companies to administer its retirement plans, the State was legally responsible for any discriminatory terms in the annuities those companies offered to its employees:

> Having created a plan whereby employees can obtain the advantages of using deferred compensation to purchase an annuity only if they invest in one of the companies specifically selected by the State, the State cannot disclaim responsibility for the discriminatory features of the insurers' options. Since employers are ultimately responsible for the "compensation, terms, conditions, [and] privileges of employment" provided to employees, an employer that adopts a fringe-benefit scheme that discriminates among its employees on the bases of race, religion, sex, or national origin violates Title VII regardless of whether third parties are also involved in the discrimination.

Id. at 1098-105 (Powell, J., dissenting

in part and concurring in part).

After concluding that the benefit plan violated Title VII, Justice Marshall turned to the issue of relief. However, on this point, Justice Marshall did not command a majority of the Court; instead, Justice Powell, in an opinion joined by Chief Justice Burger and Justices Blackmun, Rehnquist, and O'Connor, expressed the majority's views.

The district court, which had also found that the plan violated Title VII, had issued an injunction requiring the plan to pay equal benefits to men and women who retired after the date of the district court judgment. While this relief looked to the future, the Supreme Court noted that it was fundamentally retroactive in nature. Id. at 1092 (Marshall, J., concurring in the judgment

in part); id. at 1105 n.10 (Powell, J., dissenting in part and concurring in part). As Justice Marshall explained, "[t]his is true because retirement benefits under a plan such as that at issue here represent a return on contributions which were made during the employee's working years and which were intended to fund the benefits without any additional contributions from any source after retirement." Id. at 1092 (Marshall, J., concurring in the judgment in part).

In his majority opinion on this issue, Justice Powell reiterated the general rule that retroactive relief is normally appropriate in a Title VII case. He reasoned, however, that a retroactive award was not appropriate in this case for the same reasons the Court had denied such relief in Manhart. First, he noted

that while "Manhart did put all employer-operated pension funds on notice that they could not 'requir[e] that men and women make unequal contributions to [the] fund,'" the case "expressly confirmed that an employer could set aside equal contributions and let each retiree purchase whatever benefit his or her contributions could command on the 'open market.'" Id. at 1106 (Powell, J., dissenting in part and concurring in part) (quoting Manhart, 435 U.S. at 717, 718). Justice Powell stated that "[g]iven this explicit limitation, an employer reasonably could have assumed that it would be lawful to make available to its employees annuities offered by insurance companies on the open market." Id.

Second, Justice Powell argued that holding the State of Arizona and other

employers offering similar pension plans liable retroactively could have "devastating results." Id. at 1106. As Justice Marshall had explained, the retirement benefits offered by such plans represented a return on contributions, and those contributions were intended to fund the benefits, without additional contributions from other sources. And, as Justice Powell noted, if the benefits to be paid to men had already been defined, an employer could not pay women more by paying men less; instead, the employer would presumable have to "top up" women's benefits to match those paid to men. Id. at 1106 n. 11. Justice Powell indicated that the overall cost of such a ruling to the nations's pension plans would be up to $1260 million annually for the next 15 to 30 years. Id. at 1106. Moreover, the

cost of such an award in Norris would fall on the State of Arizona, or more specifically, the state's taxpayers. Justice Powell stated that "[t]here is no justification for this Court, particularly in view of the questions left open in Manhart, to impose this magnitude of burden retroactively on the public." Id. at 1107. Accordingly, the Court ruled that only benefits derived from contributions made after its decision would have to be calculated with unisex actuarial tables.

2. Application of Manhart and Norris

The State of New York argues that I should decline to award the retroactive relief Graham seeks for the same reasons the Supreme Court found a retroactive award inappropriate in Manhart and Norris. However, I cannot agree that the

Supreme Court's reasoning in those cases is equally applicable here.

As discussed above, the Court emphasized in both cases that the defendants could have reasonable concluded that their actions were lawful given the uncertain state of the law. In Manhart, the Court stated that prior to its decision there had been wide disagreement as to whether the use of sex-based actuarial tables in calculating pension contributions and benefits violated Title VII. 435 U.S. at 720. And in Norris, the Court noted that the issues before it had been expressly left open in Manhart. 463 U.S. at 1086 (Marshall, J., concurring in the judgment in part).

But while Manhart did not purport to answer all questions relating to the use

of sex-based actuarial tables in calculating retirement benefits, it did make certain rules clear. One of them was that employers could not require women to make larger contributions than men in order to receiver the same benefits as men. One might argue that that is what New York did in converting accrued-but-unused sick leave into a credit against health insurance premiums. In order for a woman to receive the same credit as a similarly situated man, she had to "contribute" more unused sick days than the man. Manhart plainly put the State on notice that this practice violated Title VII.

But even if the State's system of converting sick leave into a credit is viewed not as requiring larger contributions from women to obtain the

same benefits as men, but rather requiring equal contributions and giving smaller benefits, the Supreme Court made clear in Norris that this was no basis for distinguishing Manhart. Indeed, nearly every lower federal court that had considered it, including the Court of Appeals for the Second Circuit, rejected the suggestion that these two alternatives were somehow different. Norris, 463 U.S. at 1081 n.9 (Marshall, J., concurring in the judgment in part) (citing cases). Indeed, our court of appeals stated in Spirt v. Teachers Insurance and Annuity Ass'n, 691 F.2d 1054, 1061 (2d Cir. 1982), vacated and remanded, 103 S.Ct. 3566 (1983), decision on remand, 735 F.2d 23 (2d Cir. 1984), cert. denied, 105 S.Ct. 247 (1984), that if there was any meaningful distinction

between these two types of sex-based plans, an equal contribution, unequal benefit scheme was "more in conflict with the spirit and purposes of Title VII." Thus, it seems clear that the State should have recognized that its practice, whether viewed as discriminating at the "pay in" or "pay out" stage, was impermissible when Manhart was decided.

Similarly, the State can take no refuge in the second question Manhart left open-- whether Title VII applied only to employer-operated plans-- since the State's plan is an employer-operated plan. The principal issue Manhart left unresolved was whether Title VII would prohibit an employer from setting aside equal contributions and letting each employee purchase benefits on the open market. The State's scheme for converting

unused sick leave into a credit against health insurance premiums bears no resemblance to such a plan.

The second factor the Court cited in Manhart and Norris for denying retroactive relief was the possibility that the additional cost would fall on innocent third parties. In Manhart, the Court noted that retroactive liability might threaten the solvency of many plans and lay the harm directly on the beneficiaries themselves, and in Norris, it stressed that the very great burden of retroactive relief would fall on the taxpaying public.

Not surprisingly, the State of New York relies heavily the Court's concern in Norris that the cost of retroactive relief would constitute an unreasonable burden on the public.

But the Supreme Court's statements in that case must be placed in contest. First, the Court obviously was not saying that a court must deny a Title VII plaintiff the relief necessary to make her whole whenever the cost of that relief necessary to make her whole whenever the cost of that relief will have to be borne by a public treasury. It is beyond dispute that a Title VII plaintiff is entitled in appropriate circumstances to recover retroactive relief from a state government. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (eleventh amendment does not bar a backpay award under Title VII). Second, the Court stressed in Norris that one of the reasons retroactive relief was particularly inappropriate there was because the state of the law was

uncertain. Justice Powell concluded his opinion by stating that "[t]here is no justification for this Court, particularly in view of the question left open in Manhart, to impose this magnitude of burden retroactively on the public. 463 U.S. at 1107 (Powell, J., concurring in part and dissenting in part) (emphasis added). Finally, the Court in Norris was obviously troubled by the extremely large cost of retroactive relief in that case.

None of these factors counsels against retroactive relief in the circumstances of this case. First, as the Court reiterated in Manhart and Norris, the decision in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), creates a presumption in favor of retroactive relief in Title VII cases. Contrary to the State's suggestion, Manhart and

Norris do not purport to do away with that presumption in cases involving pension or retirement plans. Indeed, our court of appeals reaffirmed its decision to award retroactive relief in Spirt v. Teachers Insurance and Annuity Ass'n, 691 F.2d 1054 (2d Cir. 1982), vacated and remanded, 103 S.Ct. 3566 (1983), decision on remand, 735 F.2d 23 (2d.Cir. 1984), cert. denied, 105 S.Ct. 247 (1984), after the Supreme Court had vacated the court's previous decision for reconsideration in light of Norris. Second, the State in this case cannot seriously contend that the state of the law was uncertain or ambiguous. As discussed earlier, Manhart should have made it clear to the State in 1978 that its practice of using sex-based actuarial tables was illegal. Under such circumstances, there is no reason to

excuse the State's discriminatory practices.

For all of these reasons, I conclude that there is no bar to retroactive relief in this case. However, the State argues that even if the members of the proposed class are entitled to a retroactive award, their credits should be recalculated using unisex actuarial tables rather than the male tables used to calculate the credits for men who retired during the same period. The State argues that in light of Norris, "the amounts formerly paid to men based on male actuarial tables must now be viewed as a windfall. To grant women retirees an equivalent windfall goes well beyond making them whole." Defendants' Reply Memorandum of Law at 6.

This argument misses the very

essence of the Supreme Court's recent decision. I agree that, when viewed in hindsight, the amounts formerly paid to men must be considered a windfall. But if Manhart and Norris teach anything, it is that employers must not discriminate on the basis of sex. They must pay similarly situated men and women the same retirement benefits. Thus, if the State gave men a "windfall," it had to give women the same "windfall." In short, since the State used male actuarial tables to calculate the credits given to men who retired during the period in question, it must use the same tables to calculate the past credits for women.

However, with respect to future credits to be given to male and female employees who retired during this period, there appears to be no reason why the

credits for both men and women cannot be recalculated using unisex actuarial tables. This approach has two benefits. First, it would give retired female employees no more and no less than what they would have received if the State had converted to unisex tables after Manhart was decided, as Graham argues, and I agree, it should have been done. And, second, this approach would ameliorate the State's expense in remedying the situation. There is no dispute that the amounts previously paid to men based on male actuarial tables constituted a windfall for them, and will now generate an even greater windfall for women. There is nothing that can be done about recovering these unnecessary expenditures since the credits have already been paid to the man, and for all of the reasons

discussed above, the women are entitled to the same credits that the men received. There is, however, no just reason to extend this anomaly into the future at the taxpayer's expense when it can be easily corrected by recalculating both men and women's credits with unisex tables. This will give both men and women the amount of credit they would have received if the State had converted to unisex tables in the wake of Manhart. Of course, it will mean that men's credits will be reduced somewhat, which may give retired male employees cause for complaint. But there is nothing in the record before me that suggests that those male employees have a vested right to a credit based on male actuarial tables; indeed, the fact that the State converted to unisex tables in 1983 suggests that

they do not.

Conclusion

For the foregoing reasons, I conclude that Graham is entitled to a retroactive award of the difference between the past credits she received and the past credits her male counterparts received. However, with respect to future credits, the State will be directed to recalculate both men and women's benefits using unisex actuarial tables. Accordingly, plaintiff's motion for summary judgment is granted, and defendants' motion for summary judgment is denied.

The parties are directed to agree upon a proposed final judgment, in accordance with this Opinion, reserving the right to appeal the issue of retroactivity, to be submitted by March

31, 1987.

SO ORDERED.

William C. Conner
United States District Judge

Dated: New York, New York
February 17, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADELE GRAHAM et ano., etc.,

Plaintiffs,

- against -

STATE OF NEW YORK, DEPARTMENT OF CIVIL SERVICE; et al.,

Defendants.

84 Civ. 4546 (WCC)

OPINION AND ORDER

A P P E A R A N C E S :

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CONNER, D.J.:

Defendant State of New York has moved pursuant to rule 3(j) of the Local Civil rules for reargument of this Court's Opinion and Order dated February 17, 1987, familiarity with which is presumed. After carefully considering the papers submitted by the parties, I conclude that there is no reason to change my original decision. Accordingly, for the reasons set forth below, defendant's motion is denied.

Defendant claims that the Court was in error in holding that the Supreme Court decision of City of Los Angeles v. Manhart, 435 U.S. 702 (1978), put the

State on notice that their use of sex-based actuarial tables violated Title VII, since the New York system treated male and female retirees differently at the payout stage rather than at pay-in as prohibited in Manhart. Defendant claims the New York system is an instance of equal contributions producing unequal results, since sick leave accrued in the same fashion for women as it did for men. This, the State argues, was not found to violate Title VII until Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) (per curiam). The State notes that it subsequently calculated credits using a unisex table.

As I pointed out in my Opinion, it is not clear that the New York system requires equal contributions, as the

State claims. One might argue that the State, in converting accrued-but-unused sick leave into a credit against health insurance premiums, required a woman to "contribute" more unused sick days than a similarly situated man in order to receive the same credit.

Nevertheless, even if the system is viewed as one requiring equal contributions but giving smaller benefits to women, the Supreme Court made it clear in Norris that this was no basis for distinguishing Manhart. As I have said before, nearly every lower federal court that has considered sex-based plans that discriminate either at the "pay-in" or "payout" stage has rejected the suggestion that the two alternatives are somehow different. See, Spirt v. Teachers Insurance and Annuity Ass'n, 691 F.2d

1054 (2d Cir. 1982) (Spirt II), vacated and remanded, 103 S.Ct. 3566 (1983), decision on remand, 735 F.2d 23 (2d Cir. 1984) (Spirt II), cert. denied, 105 S.Ct. 247 (1984). It is clear that the State should have recognized that its practice, whether viewed as discriminating in the calculation of contributions required or in the calculation of benefits paid, was impermissible when Manhart was decided. Accordingly, this Court did not err in finding that Manhart put New York on notice that their use of sex-based tables to calculate insurance premium credits was in violation of Title VII.

Defendant also objects to the Court's award of retroactive relief, arguing that although Norris held that the use of sex-based tables was no more permissible to calculate payout than it

was to calculate contributions, the Supreme Court in that case declined to award retroactive relief in light of the "question left open in Manhart," 463 U.S. at 1107, and the large burden a retroactive award would place on public treasuries.

As outlined above, although Manhart, left certain issues open, it is clear that the system used by New York did not involve "questions left open" by the Manhart decision. The State has made much of the cost of retroactive relief and argues that it would constitute an unreasonable burden on the public, in spite of the presumption in favor of retroactive relief in Title VII cases. See, Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Manhart and Norris do not purport to do away with that

presumption in cases involving a pension or retirement plan.

The Second Circuit reaffirmed its decision to award retroactive relief in Spirt II after the Supreme Court had vacated the court's previous decision for reconsideration in light of Norris. As analyzed in Spirt II, the entire thrust of Justice Powell's discussion on relief in Norris "focuses on the burdens that retroactivity would impose upon the employer of the plan." Spirt II, at 27. Essentially, the Supreme Court was concerned that an award of retroactive relief in Norris would require disbursing greater benefits than the collected contributions could support, jeopardizing the solvency of the entire pension fund. Retroactive relief was not awarded in Manhart or in Norris because to do so

would impose an onerous financial burden on the employer or the plan and ultimately put every employee's retirement benefits at risk. See, Norris, 103 S.Ct. at 3512 (O'Connor, J., concurring).

We do not have that problem here. The State has submitted an Affidavit from Thomas McCracken outlining the expense the State would bear if an award of retroactive relief is made. The actual cost of retroactively changing future monthly credits depends upon the rate of terminations, elective changes in coverage, and increases in premiums, which result in greater use of available credits. (McCracken Affidavit paragraph 6) McCracken's estimates assume (1) a percentage increase in monthly credits of 18%, using unisex tables for future

credits; (2) a constant rate of retirements from January 1, 1979 through July 31, 1983; (3) that the increase in use of available credits as premiums rise and changes in coverage will cancel each other out; (4) the assumptions will remain valid through 1990. (McCracken Affidavit paragraph 7). The State's total monthly contribution for the 10,366 female employees who retired between January 1, 1979 and July 31, 1983 is $21,769.96. An increase of 18% in this amount would cost the State only $3,919 a month, or approximately $47,000 a year. The added cost would be proportionately reduced if, in any case, the increase would bring the amount of monthly credit to an amount greater than the portion of the premium due from the retiree. (McCracken Affidavit paragraphs 8, 9).

This burden on the New York State Treasury is several orders of magnitude less than that which would have been imposed upon the Treasury of Arizona in Norris. In that case, if the Supreme Court had awarded retroactive relief, Arizona would have been forced to pay from $817 million to $1.26 billion annually for 15 to 20 years. Here, the estimated total cost of the retroactive award through 1990 is roughly half a million dollars. (McCracken Affidavit, Table II).

Finally, New York argues that the calculation of future credits for retirees during the period at issue cannot be done using a unisex table because to do so would reduce male benefits calculated upon retirement pursuant to N.Y.S. Civil Service Law,

section 167. Although this calculation is made and transmitted to the individual retirees, it is not set in stone. As New York points out, the amount of monthly credit and the amount each retiree is expected to contribute toward the insurance premiums is subject to fluctuation for a number of reasons. (See, McCracken Affidavit, paragraph 6)

For the reasons set forth above, defendant has not persuaded me that there is any reason to reconsider the Court's Opinion and Order of February 17, 1987. Accordingly, defendant's motion to reargue is denied.

SO ORDERED.

William C. Conner
United States District Judge

Dated: New York, New York
July 20, 1987

UNITED STATES DISTRICT COURT
FOR THE SECOND CIRCUIT

Nos. 312, 446 -- August Term, 1988

(Argued November 1, 1988
Decided November 17, 1988)

Docket No. 87-9017, 87-9035

ADELE GRAHAM and TAMAARA DANISH, individually and as representatives of a class of persons similarly situated,

Plaintiffs-Appellants-Cross-Appellees,

v.

STATE OF NEW YORK, DEPARTMENT OF CIVIL SERVICE; EDWARD V. REGAN, as Comptroller of the State of New York; MARIO CUOMO, as Governor of the State of New York,

Defendants-Appellees-Cross-Appellants.

Before LUMBARD, OAKES, and NEWMAN, Circuit Judges.

Appeal from judgment of the United

States District Court for the Southern District of York, William C. Conner, Judge, granting plaintiffs' motion for summary judgment in suit seeking recalculation of retirement benefits.

Remanded for reconsideration in light of Florida v. Long, 56 U.S.L.W. 4718 (U.S. June 22, 1988).

James I. Meyerson, New York, NY (Adele Graham, Santa Fe, NM, of counsel), for Plaintiffs-Appellants-Cross-Appellees.

Jan P. Ryan, Assistant Attorney General, (Robert Abrams, Attorney General of the State of New York, Nancy Miller Lerner, Ellen J. Fried, Assistant Attorneys General, New York, NY, of counsel), for Defendants-Appellees-Cross-Appellants.

PER CURIAM:

This appeal is from a judgment entered in the United States District Court for the Southern District of New

York, William C. Conner, Judge, granting summary judgment to Graham and a class of retired female state employees who requested retroactive recalculation of amounts credited them for unused sick days under sex-based actuarial tables. Graham v. New York, 653 F.Supp. 1363 (S.D.N.Y. 1987), motion to reargue denied, 664 F.Supp. 166 (S.D.N.Y. 1987).

We remand for consideration in light of Florida v. Long, 56 U.S.L.W. 4718 (U.S. June 22, 1988), and retain jurisdiction in the event of a subsequent appeal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADELE GRAHAM and TAMAARA DANISH, individually and as representatives of a class of persons similarly situated,

Plaintiffs,

- against -

STATE OF NEW YORK, DEPARTMENT OF CIVIL SERVICE; EDWARD V. REGAN, as Comptroller of the State of New York; MARIO CUOMO, as Governor of the State of New York,

Defendants.

84 Civ. 4546 (WCC)

OPINION AND ORDER

A P P E A R A N C E S :

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CONNER, D.J.:

This opinion revisits a decision rendered by this Court in February, 1987. Graham v. State of New York, Department of Civil Service, et al., 654 F.Supp. 79 (S.D.N.Y. 1987) (Conner, J.). While that decision was on appeal to the Court of Appeals for the Second Circuit, the Supreme Court issued an opinion bearing directly on the question I had previously faced. As a result, the court of appeals remanded this case to me in light of

Florida v. Long, 108 S.Ct. 2354 (1988).

In my earlier decision, familiarity with which is presumed, I held that plaintiff Adele Graham was entitled to summary judgment on the issue of retroactive relief, in her action challenging defendant New York State's use of gender-based actuarial tables in determining the amount of monthly credit an employee of the State receives toward the cost of health care insurance after retirement. Since Long has undermined my earlier decision, and since I find Graham's alternative grounds for retroactive relief unpersuasive, plaintiff's claim for such relief is dismissed.

BACKGROUND

Upon retirement, an employee of the State of New York ("the State") receives

from the State a monthly credit toward the cost of his health care insurance based on the amount of unused sick leave he has accumulated by the time he retires. N.Y. Civ. Serv. Law section 167(4) (McKinney 1983). The amount of this monthly credit is fixed at the time of the employee's retirement, and is paid on his behalf for the remainder of his lifetime. Id. In calculating the amount of the credit, the State assigns a dollar value to the employee's unused sick days by multiplying the number of unused sick days by the employee's daily rate of pay at the time of his retirement. Id. Next, using actuarial tables, the State computes the proper monthly contributions by dividing this total dollar value by the number of months in the employee's remaining life expectancy. Id. The State

makes these monthly contributions toward the employee's insurance plan premiums, in addition to the State's ordinary contribution, with the employee paying any leftover premium. Id.

Prior to August 1, 1983, the State utilized gender-based actuarial tables to calculate the monthly contributions. These tables showed longer life expectancies for women than for men, and therefore produced lower monthly contributions for women. However, on August 1, 1983, in accordance with the Supreme Court's Decision in Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983), the State abandoned gender-based actuarial tables in favor of unisex actuarial tables, thereby equalizing the monthly

benefits paid for men and women who retired after that date.

Plaintiff Adele Graham ("Graham") retired from her position as a staff attorney in the State's Division of Human Rights in 1981, two years prior to Norris. She brought this action against the State and certain state officials, alleging that the use of gender-based actuarial tables prior to August 1, 1983 violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sections 2000e to 2000e-17 (1982), the Civil Rights Act of 1871, 42 U.S.C> section 1983 (1982), the fourteenth amendment to the United States Constitution, and article I, section 11 of the New York Constitution. She proposes to represent a class of female employees who retired prior to August 1,

1983, and seeks on their behalf a retroactive award of the difference between the contributions paid on their behalf and those paid for retired male employees.[1]

DISCUSSION

I. The Impact of Florida v. Long

Long is the latest in a trilogy of Supreme Court opinions confronting the problem of pension plans that discriminate on the basis of sex. The first case in the trilogy, City of Los Angeles Department of Water and Power v.

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1 The motion now before me deals solely with the issue of retroactivity under Title VII, and not with plaintiff's other causes of action sounding under the United States constitution, the New York State constitution, section 1983, or arising under contract law. Nor does this motion prejudice defendants' ;right to pursue the defenses raised in their answer.

Manhart, 435 U.S. 702 (1978), held that a pension plan requiring female employees to make larger contributions than male employees violated Title VII of the Civil Rights Act of 1964. The second, Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983), found that Title VII prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay lower monthly retirement benefits to a woman than to a man who has made the same contributions. The Norris Court further precluded retroactive relief, holding that benefits derived from contributions made prior to its decision in Norris could be calculated as provided by the existing

terms of the employer's plan. Id. at 1075. Thus, Manhart prohibited unequal contributions, and Norris prohibited unequal benefits.

Finally, in Long, the Court addressed the question of whether Manhart placed employers on notice that optional pension plans offering sex-based benefits violated Title VII and therefore justified retroactive relief from the date of that decision. The Long Court held that Norris, and not Manhart, "is the controlling liability date and that liability may not be imposed for pre-Norris conduct." Long, 108 S.Ct. at 2359.

In Long, Justice Kennedy identified three criteria for determining whether retroactive awards are appropriate in Title VII cases involving the use of gender-based actuarial tables. The first

is whether Manhart clearly defined the employer's obligations under Title VII. The second is "whether retroactive awards are necessary to the operation of Title Vii Principles by acting to deter deliberate violations or grudging compliance." the third is the effect of retroactive liability on the financial viability of pension funds and the contractual rights of male employees. Id. at 2359. Based on his application of the three foregoing criteria, Justice Kennedy concluded that the "effective date of our decision in Norris provides the appropriate limit on retroactive liability in this case." Id. However, the Court left open the question of relief for pre-Norris retirees who seek to have their benefits adjusted from the date of that decision, where the adjustment would

not require an infusion of new funds from the employer or infringe the contractual rights of male retirees. Id. at 2364.

II. Plaintiff's Preliminary Argument In Favor of Retroactive Relief

Plaintiff first argues that my earlier decision withstands Long because this case involves contributions, as in Manhart, and not benefits, as in Norris and Long. I disagree. In my prior decision, I did not resolve whether the pre-Norris New York scheme involved unfair contributions or benefits. I now determine that the case involves benefits, since under the pre-Norris New York plan, women received smaller monthly credits from the state than men. The contributions required for men and women were equal under the New York plan: both male and female employees "contributed"

whatever sick days they had not previously used, and their total credit was computed by multiplying the unused days by their daily wage at the time of retirement. Although it is true that in order to attain the same monthly benefits as their male counterparts, female employees would have had to contribute more sick days, they did not do so in practice. Therefore this case, like Norris, must be viewed as a "benefits" case, and is governed by the Court's holdings in Norris and Long.

III. Applying Long to the Current Case

Each of the three factors considered by the Long Court militates against retroactive relief in the case I am now reconsidering.

A. Notice

With respect to notice, Justice

Kennedy concluded that because Manhart (1) had limited its holding to unequal contributions, (2) had explicitly left open the issue of whether Title VII precluded unequal benefits, (3) had been supported by a bare majority of the Justices, and (4) had been construed in varying ways by different courts, the decision did not alert pension-fund administrators that unequal benefits violated Title VII. Thus, under the reasoning of Long, New York cannot be held to have been given notice by Manhart that unequal benefits were discriminatory, because Manhart decided only that unequal contribution requirements violated Title VII.

Plaintiff also claims that if defendants were not put on notice on Manhart, then notice was given by

decisions reached in a New York state court and/or the Court of Appeals for the Second Circuit. I find that neither of the decisions referred to by plaintiff was sufficient to give defendants pre-Norris notice that the use of sex-based actuarial tables was prohibited for the calculation of post-retirement health benefits.

In New York State Department of Civil Service v. New York State Human Rights Appeal Board, 66 App.Div.2d 309, 414 N.Y.S.2d 46 (1979), the court confirmed an administrative determination that pregnancy-related disabilities should be treated the same as other types of temporary physical disabilities for the purposes of receiving medical benefits under the New York State Health Insurance Program, and that women should

not be required to enroll for family coverage in order to obtain maternity benefits. First, the case did not provide adequate notice because it was ambiguous as to whether it addressed unequal benefits or unequal contributions.

> An employer which offers a comprehensive individual health insurance plan that denies benefits for pregnancy and childbirth clearly offers a less comprehensive plan to its female employees than to its male employees. A requirement that female employees must pay more for comprehensive coverage to include medical conditions unique to their sex than male employees pay for comprehensive coverage including all conditions unique to their sex is patently discriminatory.

Id. at 49. Second, the case cannot be used as the basis for providing retroactive relief to plaintiff, because it did not find discrimination under Title VII, but under the state's Human Rights Law. Moreover, its holding was limited to pregnancy-related

disabilities. A finding that New York State's Human Rights Law requires that pregnancy be covered by a state-sponsored comprehensive insurance plan does not inform the State that calculating contributions to a health care plan for retired state employees using sex-based actuarial tables is impermissible under Title VII.

The Second Circuit decision that plaintiff claims could have given defendants notice is Spirt v. TIAA-CREF, 475 F.Supp. 1298 (S.D.N.Y. 1979), aff'd in part and rev'd in part, 691 F.2d 1054 (2d Cir. 1982), vacated, 463 U.S. 1223, modified, 735 F.2d 23 (2d Cir.), cert. denied 469 U.S. 881 (1984). Spirt involves a situation similar to the one addressed in this case, namely unequal benefits calculated from gender-based

actuarial tables, but significantly was still pending on appeal when the Norris decision was handed down by the Supreme Court. The final Spirt decision by the Second Circuit was not issued until approximately one year after Norris. So, while plaintiff is correct about the duty of agencies to follow the decision of the circuit courts in the jurisdictions in which they are located, this duty attaches only to final decisions. If the rule were otherwise, the administration of agencies would be unmanageable because agencies might be required to alter their behavior numerous times as a case made its way through the appeals process.

B. Deterrence

Long also establishes that deterrence furnishes no justification for granting plaintiff retroactive relief.

Just as Florida immediately complied with the Court's decision in Norris, New York swiftly erased the discriminatory aspects of its benefits plan after the Supreme Court's ruling. Where the state has quickly and willingly conformed with the law, a punitive measure is unwarranted. Long, 108 S.Ct. at 2362 ("In the pension context, we have considered whether retroactive awards are necessary to further the purposes of Title VII and to ensure compliance with our decisions, and we have concluded that retroactivity is not required.").

C. Maintaining the Financial Viability of Pension Funds and Respecting the Contractual Rights of Male Employees

A retroactive remedy requires additional money. There are only three

possible sources for this money: depleting the fund, requiring an infusion from the employer, or cutting the benefits of male retirees. In Long, the Supreme Court declined to require the employer to pay the additional money required. Justice Kennedy wrote, "[r]etroactive awards, applied to every employer-operated pension plan that did not anticipate our decision, would impose financial costs that would threaten the security of both the funds and their beneficiaries." Id. at 2262-63. The Court also precluded retroactive relief which would result in diminishing the benefits paid to male retirees who had made their contributions expecting a particular return, and had a concomitant contractual right to rely on receiving a fixed amount of benefits upon retiring. Id. at 2362

("resulting harm to other retirees as innocent third parties" militates against applying the rule retroactively). Although the Court's holding was limited to denying retroactive relief, Long's dictum suggests that a retroactive award which obtains its extra money by diminishing the benefits paid to male retirees who had no contractual right to a fixed level of benefits or rate of return on their contributions might be permissible. Long, 108 S.Ct. at 2364.

> A different case, and a different assessment of retroactivity, might result under pension plan structures which do no provide retirees with a contractual right to a fixed level of benefits or rate of return on contributions. See, Spirt v Teachers Insurance and Annuity Assoc., 735 F.2d 23, 28 (2d Cir. 1984). There, an award for future increase may require neither additional funding by the State or employer nor violation of contractual rights of other retirees.

Id. at 2364.

Plaintiff argues that this case is the kind of exception anticipated by Justice Kennedy in Long, and given body by the Second Circuit in Spirt, because it does not involve a pension fund accumulated under actuarial assumptions, Plaintiff's Memorandum of Law after Remand at 4-6, will not impose an onerous financial burden on the state, id., and will not upset a "fixed and predetermined level of benefits" owing to retirees. Id. at 3.

An examination of Spirt explains why retroactive relief was permissible there, but impermissible under the circumstances of this case. In Spirt, the court of appeals allowed a retroactive award after finding that neither the employer nor the plan would be burdened with any additional financial obligations, and

there would be not reduction in the annuities to which male retirees were contractually entitled. This was, so the court reasoned, because the plan did not guarantee male retirees a certain stream of income. 735 F.2d at 27. Instead, the plan expressly informed participants that the income received from the annuity would vary each year, reflecting the yield of the securities in the plan's portfolio. Id. thus, higher payments to women could be financed by reducing the payments to men, without requiring an infusion of money from the state. Id. at 27-28.

The New York scheme in the present case cannot be analogized to the pension plan in Spirt. Although under the plan here in question male employees of New York State do not make monetary

contributions to any fund during the course of their employment, they are certainly award that pay for unused sick days may be applied to reduce their health plan premiums when they retire. Moreover, they are informed upon retiring that under this plan the state will make a specified monthly contribution to their health plans for the rest of their lives. Thus, male employees "contribute" sick days, and, unlike their counterparts in Spirt, have been led to expect a specific level of retirement benefits to which they have an at least arguable contractual entitlement.

Granting plaintiff's request for relief to females who retired before August 1, 1983 would constitute a retroactive award necessitating an infusion of funds. Either the funds would

be supplied by the state, see McCracken Affidavit, thereby imposing the kind of fiscal hardship avoided in Spirt and prohibited by Long, or they would be obtained by diminishing the benefits promised by the State to male retirees, also deviating from Spirt and violating Long. Therefore, retroactive relief is impermissible here.

Having weighed the three factors recognized by Long, I must deny plaintiff's request for retroactive relief.

CONCLUSION

For the foregoing reasons, my Opinion and Order dated February, 1988 is vacated and plaintiff's claim for retroactive relief under Title VII is dismissed.

SO ORDERED.

William C. Conner
United States District Judge

Dated: New York, New York
July 14, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADELE GRAHAM et ano., etc.,

Plaintiffs,

- against -

STATE OF NEW YORK, DEPARTMENT OF CIVIL SERVICE, et al.,

Defendants.

84 Civ. 4546 (WCC)

AMENDED OPINION AND ORDER

CONNER, D. J.

The Opinion and Order, dated July 14, 1989, is hereby amended nunc pro tunc as follows:

On the Appearance page - Under the name JAMES I. MEYERSON, ESQ., the address should read -- 396 Broadway, New York, New York 10013 -- instead of 351 Broadway, New York, New York 10013.

SO ORDERED.

William C. Conner,
United States District Judge

Dated: New York, New York
July, 21, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADELE GRAHAM, et al.,

PLAINTIFFS,

- against -

STATE OF NEW YORK, DEPARTMENT OF CIVIL SERVICE, et al.,

DEFENDANTS.

84 Civ. 4546 (WCC)

JUDGMENT

This action came before the Honorable William C. Conner, District Judge, presiding, upon Cross-Motions for Summary Judgment. An Opinion and Order, dated February 17, 1987 granted Plaintiff's Motion for Summary Judgment and denied Defendants' Motion for Summary Judgment. Defendants' Motion for Reconsideration was denied in an Opinion and Order dated July 20, 1987 and amended July 21, 1989. The Opinion and Order were

appealed to the United States Court of Appeals for the Second Circuit which remanded the matter to this Court for further consideration in light of Florida v. Long, 108 S.Ct. 2354 (1988). This Court, after submissions by the parties, vacated its prior Opinion and Order and dismissed Plaintiff's Title VII claims for retroactive relief, while retaining jurisdiction over non-Title VII claims. Plaintiff again appealed to the United States Court of Appeals for the Second Circuit and the matter, by stipulation, was withdrawn on appeal for further consideration by this Court of the remaining claims. Since this Court, by an Order dated October 20, 1989, ordered Plaintiff's withdrawal of all remaining claims not resolved by this Court in its July 1989 Opinions,

IT IS ORDERED, ADJUDGED and DECREED:

That Plaintiff's prayer for relief under Title VII id denied in all respects, including the prayer for class relief and costs and fees, and Plaintiff's other claims, are withdrawn and dismissed, without prejudice.

Dated: New York, New York
November 16, 1989

William C. Conner
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 956-- August Term, 1989

(Argued April 5, 1990)

Docket No. 89-9119

ADELE GRAHAM and TAMAARA DANISH, individually and as representatives of a class of persons similarly situated,

Plaintiffs-Appellants,

-V-

STATE OF NEW YORK, DEPARTMENT OF CIVIL SERVICE; EDWARD V. REGAN, as Comptroller of the State of New York; MARIO CUOMO, as Governor of the State of New York,

Defendants-Appellees.

BEFORE:

KAUFMAN, FEINBERG and WALKER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern

District of New York, William C. Conner, Judge, dismissing plaintiffs' claim for retroactive relief in their suit seeking recalculation of retirement benefits.

Judgment affirmed.

Judge Feinberg concurs in a separate opinion.

JAMES I. MEYERSON, New York, NY (Adele Graham, Santa Fe, NM, of Counsel), for Plaintiffs-Appellants.

NANCY M. LERNER, New York, NY Assistant Attorney General of the State of New York (Robert Abrams, Attorney General of the State of New York, O. Peter Sherwood, Solicitor General, Ellen J. Fried, Assistant Attorney General, of Counsel), for Defendants-Appellees.

WALKER, Circuit Judge:

Plaintiff Adele Graham on behalf of herself and a proposed class of female employees of the State of New York who retired prior to August 1, 1983, appeal

from a judgment entered in the United States District Court for the Southern District of New York (Conner, J.) dismissing their claim for retroactive relief in their suit challenging the State's use of sex-based actuarial tables to determine monthly credits toward the cost of retirees' health insurance. Because we agree with the district court that such relief is inappropriate in light of the Supreme Court's decision in Florida v. Long, 487 U.S. 223 (1988), we affirm.

BACKGROUND

New York Civil Service Law provides that retired state employees may participate in the health insurance plan established for state employees. N.Y.Civ.Serv.Law section 163(2) (McKinney 1983). The State of New York ("the

State") pays part of the cost of this insurance and the balance is paid by the retired employee in the form of deductions from his or her monthly pension. A retiree's monthly contribution toward the cost of health insurance may be reduced through the application of a monthly credit based on the amount of the employee's accumulated but unused sick leave at the time of retirement. Sick leave credits are converted to a dollar amount which is used to reduce that portion of the retiree's health insurance premium paid by the retiree and to increase pro tanto that portion paid by the State.

As Judge Conner cogently explained, the amount of this monthly credit is determined at the time of the employee's retirement, and is paid by the State on

her behalf for the remainder of her lifetime. N.Y.Civ.Serv.Law section 167(4) (McKinney 1983). In calculating the amount of the credit, the State assigns a dollar value to the employee's unused sick days by multiplying the number of unused sick days by the employee's daily rate of pay at the time of retirement. Id. If this dollar amount is greater than $100, the State, using actuarial tables, computes its monthly payment for unused sick leave by dividing this total dollar value by the number of months in the employee's remaining life expectancy. Id. The State then adds the sick leave increments to the State's base contribution to the retiree's insurance premiums. The employee pays the portion of the monthly premium beyond the State's base contribution plus sick leave

increment.

Pertinent to this appeal, prior to August 1, 1983, the State used gender-based actuarial tables to calculate its monthly sick leave payments under section 167(4). Because these actuarial tables indicate that women live longer than men, the statutory formula produced lower monthly State unused sick leave payments for female than for male retirees possessing the same amount of unused sick leave and earning the same salary upon retirement. However, on August 1, 1983, in accordance with the Supreme Court's decision in Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans et al. v. Norris, 463 U.S. 1073 (1983),[1] the State abandoned

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1 In Norris, the Supreme Court held that unequal pension benefits for male and female

its practice of using sex-differentiated actuarial tables in favor of unisex tables, which had the effect of equalizing the monthly payments in respect of unused sick leave for similarly situated men and women who retired after that date. See Graham v. State of N.Y., Dept. of Civil Service, 716 F.Supp. 802, 803 (S.D.N.Y. 1989). Women who retired between April 25, 1978 and July 31, 1983, however, remain subject to the disparity that resulted from the State's initial use of gender-based actuarial tables.

Plaintiff Adele Graham ("Graham")[2]

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employees based on actuarial tables reflecting women's greater lifespans violates the sex discrimination prohibitions of Title VII.

2 Tamaara Danish initially sued as a class representative as well. However, she subsequently

served as a staff attorney in the State's Division of Human Rights until her retirement in 1981, two years prior to Norris. At that time, the State calculated her monthly health insurance credit using sex-differentiated actuarial tables. She brought this action against the State, proposing to represent a class of female employees who retired prior to August 1, 1983, seeking a retroactive award of the difference between the payments made on their behalf and on behalf of male retirees. The complaint alleged that the use of gender-based actuarial tables prior to August 1, 1983 violated Title VII of the Civil Rights

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abandoned her claim in the district court as she had not yet retired when the litigation began and the State has ceased its use of the sex-based actuarial tables at issue in the case.

Act of 1964, as amended, 42 U.S.C. sections 2000e to 2000e-17 (1982), the Civil Rights Act of 1871, 42 U.S.C. section 1983 (1982), the fourteenth amendment to the United States Constitution and article I, section 11 of the New York Constitution.

The parties cross-moved for summary judgment on the issue of whether the proposed class was entitle to the retroactive relief demanded. In February 1987, Judge Conner granted the plaintiffs' motion concluding that the proposed class was indeed entitled to such relief. See Graham v. State of N.Y., Dept. of Civil Service, 653 F.Supp. 1363 (S.D.N.Y. 1987). He reasoned that the Supreme Court's decision in City of Los Angeles Department of Water and Power v. Manhart, 435 U.S. 702 (1978), which

held that unequal pension plan contributions for male and female employees based on sex-differentiated actuarial tables violates Title VII, made clear that the State's use of such tables to calculate health insurance credits was illegal. The State appealed the district court's decision.

While the appeal was pending this court, the Supreme Court announced its decision in Florida v. Long, in which it held that Norris, rather than Manhart, established the appropriate date for commencing liability for employer-operated pension plans that offered discriminatory benefits. Manhart, the Court reasoned, did not place employers on notice that optional pension plans offering sex-based benefits violated Title VII because its holding was

carefully limited to unequal contributions, as distinct from benefits. Accordingly, pension fund administrators could have reasonably concluded that the decision was confined to sex-based contributions and did not prohibit plans from offering sex-differentiated benefits. Long, 487 U.S. at 233. We remanded the case to the district court for reconsideration in light of Long.

On remand, the district court vacated its earlier opinion and dismissed the plaintiffs' claim for retroactive relief.[3] The court reasoned that in its initial decision it had not decided whether New York's health insurance credit scheme involved sex-differentiated

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[3] The plaintiffs withdrew their state and federal constitutional claims, as well as their claims under 42 U.S.C. section 1983 by stipulation.

contributions or benefits, a critical distinction under Long. Upon reconsideration, the court concluded that the practice at issue involves benefits rather than contributions, and applying the three factors set forth in Long, the court concluded that retroactive relief would be impermissible under the circumstances of this case. This appeal followed.

DISCUSSION

In Florida v. Long, state employees brought a class action alleging that Florida's pension plan system violated Title VII because it offered state retirees a sex-based annuity option that paid males lower monthly payments than females. The plaintiffs sought retroactive compensation for underpayment of benefits contending that Manhart had

put the state on notice that its use of sex-based actuarial tables in the calculation of pension benefits was illegal. The district court agreed, awarding the class the difference between the benefits male retirees did receive and the benefits they would have received had the Florida system used unisex mortality tables. The Eleventh Circuit affirmed.

In reversing the Eleventh Circuit, the Supreme Court reiterated the three criteria that must be considered in determining the availability of retroactive relief in Title VII cases involving the use of gender-based actuarial tables.

> The first is to examine whether the decision established a new principle of law, focusing, in this context on whether Manhart clearly defined the employer's obligations under Title VII with respect to benefits

> payments. The second criterion is to test whether retroactive awards are necessary to the operation of Title VII principles by acting to deter deliberate violations or grudging compliance. The third is to ask whether retroactive liability will produce inequitable results for the States, employers, retirees, and pension funds affected by our decision.

Long, 487 U.S. at 230. Applying these factors, we conclude, as did the district court, that retroactive relief would be inappropriate under the circumstances presented here.

At the outset, we must address plaintiffs' contention that Long is not dispositive of this case as Long involved the use of gender-based actuarial tables in the pension context. They contend that because Long is factually distinguishable from this case which involves not a fixed pension fund but a health benefit financed with annual appropriations, its

reasoning is not instructive here. However, we do not believe that the analysis and rationale set forth in Long are so limited.

While plaintiffs correctly note that Long involved a fixed pension fund and that one of the Court's reasons for precluding retroactive award in that case was a desire to protect fixed pension funds from the potentially catastrophic economic impact of such awards, id. at 235-36, plaintiffs underestimate the usefulness of the decision in assessing the appropriateness of retroactive relief in related Title VII contexts. The Long analysis is sensitive to the difference between pension benefits, which are typically paid out of fixed funds, and benefits like the one at issue here, which are financed with annual

appropriations. Fixed pension funds may not be able to support retroactive awards which could interfere with the fund's "financial calculus... that determines contribution rates to support a predicted level of payments." Id. at 238. In such cases, the third factor of the Long retroactivity analysis-- whether retroactive liability will produce inequitable results for the states, employers, retirees and pension funds affected-- will weigh heavily against retroactive relief. Where no fixed fund is at issue, analysis under the third factor may suggest that a retroactive award is warranted. Thus, Long's flexible analysis and rationale are instructive in a variety of factual contexts.

Graham's reliance on State v. Commission on Human Rights and

Opportunities, 211 Conn. 464, 559 A.2d 1120 (1989), for the proposition that Long should be construed narrowly to apply only to pensions is misplaced. That case was decided on state law grounds and the court specifically state that Long was not binding on its interpretation of Connecticut's antidiscrimination statutes. State v. Commission, 559 A.2d at 1128. While the court noted the similarities between Title VII and the Connecticut law, it also acknowledged that the state statute contemplates broader relief than its federal counterpart. Id. at 1128-29. Accordingly, the narrow interpretation of Long adopted by the Connecticut court, resulting in a broader retroactive award in that case, is not dispositive here.

Applying the Long analysis to the

facts before us, we agree with the district court that retroactive relief is inappropriate under the circumstances presented in this case.

Notice

The first factor to be considered in determining whether a retroactive award is appropriate is whether the employer was on notice that its conduct was illegal prior to the judicial determination of its liability. Graham argues that the State was on notice because the practice at issue involved discriminatory contributions invalidated in Manhart which was decided in 1978, rather than benefits which were not clearly held to be illegal until the Supreme Court's 1983 decision in Norris. Although the characterization of the State's practice is not free from

ambiguity, we agree with the district court that the State's health credit scheme is properly viewed as one involving unequal benefits rather than contributions.[4]

Under the State's program, similarly situated retirees paid into the system

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4 The State suggests that Judge Conner's characterization of the case as one involving discriminatory benefits rather than contributions is a question of fact that should not be disturbed by this Court unless it is clearly erroneous. We do no agree. The facts are not disputed here. The parties disagree as to the legal significance that should be accorded them. Accordingly, we review the district court's characterization of the STate's practice de novo as it is a mixed question of fact and law. See U.S. v. Yonkers Board of Education, 837 F.2d 1181, 1218 (2d Cir. 1987), cert. denied, 48 6 U.S. 1055 (1988); first National Bank of Cincinnati v. Pepper, 547 F.2d 708, 710 (2d Cir. 1976) (Friendly, J.).

equally-- they turned over to the state their accumulated but unused sick days. The inequality came at the pay-out stage. Using gender-based actuarial tables, the State converted equal payments into disparate pay-outs in the form of credits toward the retiree's health insurance. Thus, a male retiree with ten unused sick days would receive a larger credit toward his health insurance than a similarly situated female retiree. To be sure, these disparate benefits resulted in females having to contribute more toward the cost of their health insurance than their male counterparts. However, this is a function of the unequal value the State assigned the objectively equal unused sick leave contributions of male and female retirees.

We are mindful that in the insurance

context, the distinction between benefits and contributions is more a matter of semantics than substance. As the practice at issue here demonstrates, a co-insurance scheme using sex-differentiated actuarial tables involves both unequal benefits and unequal contributions depending upon the perspective from which one views the practice-- the employee's or the employer's. From the female employee's perspective, the State's diminished contribution on her behalf requires that she contribute more toward the cost of her health insurance. From the State's perspective, however, it is providing unequal benefits to male and female retirees with identical attendance records and salaries. But the Supreme Court has determined that the distinction

between contributions and benefits is critical to our inquiry. Because notice focuses on the knowledge of the State at the time it engaged in the discriminatory conduct, fairness requires that we view the practice from the State's rather than the retiree's perspective. Accordingly, we agree with the district court that this case must be viewed as a "benefits" case.

Long established that because Manhart's holding was limited to unequal contributions and because it explicitly left open the issue of whether Title VII precluded unequal benefits, Manhart did not put employers on notice that unequal benefits violate Title VII. Thus, as Judge Conner concluded, "under the reasoning of Long, New York cannot be held to have been given notice by Manhart

that unequal benefits were discriminatory, because Manhart decided only that unequal contribution requirements violated Title VII." Graham, 716 F.Supp. at 805.

Moreover, even if we were to agree with plaintiffs that the health insurance scheme involves unequal contributions that benefits, given the ambiguities inherent in characterizing the State's practice in this case as a benefit or contribution, we would be reluctant to conclude that Manhart gave the State fair notice of the illegality of its practice. New York could have concluded in good faith that the health credit scheme involved unequal benefits. See Long, 487 U.S. at 230 (the decision in Manhart must have "clearly defined the employer's obligations under Title VII" to make

retroactive award appropriate). Under these circumstances, we cannot say that Manhart put the State on notice.

Plaintiffs contend in the alternative that even if Manhart did not alert the State to the error of its ways, pre-Norris decisions of other courts put the State on notice that its practice was unacceptable. Judge Conner correctly rejected this argument.

Graham first points to New York State Department of Civil Service v. New York State Human Rights Appeal Board, 66 A.D.2d 309, 414 N.Y.S.2d 46 (3rd Dep't 1979), in which the court confirmed an administrative decision that pregnancy-related disability should be treated the same as other types of temporary physical disabilities for the purposes of eligibility for medical benefits under

the New York State Health Insurance Program, and that women should not be required to enroll for family coverage in order to obtain maternity benefits. We agree with the district court that this case did not put the State on notice that the use of gender-based actuarial tables in the calculation of health benefits violates Title VII. First, as Judge Conner noted, the decision is ambiguous as to whether it involved unequal benefits or contributions.[5] Furthermore,

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5 The court, in discussing the New York State Health Insurance Program, wrote that

> An employer which offers a comprehensive individual health insurance plan that denies benefits for pregnancy and childbirth clearly offers a less comprehensive plan to its female employees than to its male employees. A requirement that female employees must pay more for comprehensive coverage

the court based its holding not on Title VII, the statute under which plaintiffs seek retroactive relief, but on the New York Human Rights Law. Finally, as the district court concluded, the State was not remiss for failing to extrapolate from the decision that the use of gender-based actuarial tables in calculating health benefits would violate Title VII since the court's holding was limited to the coverage of pregnancy-related disability under a state sponsored health plan.

> to include medical conditions unique to their sex than male employees pay for comprehensive coverage including all conditions unique to their sex is patently discriminatory.

New York State Department of Civil Service v. New York State Human Rights Appeal Board, 66 A.D.2d at 314, 414 N.Y.S.2d at 49.

Nor can we say that Spirt v. TIAA-CREF, 475 F.Supp. 1298 (S.D.N.Y. 1979), aff'd in part and rev'd in part, 691 F.2d 1054 (2d Cir. 1982), vacated, 463 U.S. 1223, modified, 735 F.2d 23 (2d Cir.), cert. denied, 469 U.S. 881 (1984), should have alerted the State prior to Norris that its practice was discriminatory. Although Spirt similarly involved unequal benefits calculated on the basis of gender-differentiated actuarial tables, it was still pending on appeal when Norris was decided. The State cannot be held to notice of an unlawful practice, and thus cannot be expected to change its policy, on the basis of a decision that is still wending its way through the appeals process and is therefore subject to change. Cf. Long, 487 U.S. at 233 ("Our close division in [Norris]...

suggests that application of the earlier law [in Manhart] to differential benefits was far from obvious.")

Graham contends that the district court confuses notice with duty, arguing that once a court says that use of sex-differentiated actuarial tables in calculating benefits is discriminatory, an employer then has notice of that concept even though no mandate has been specifically addressed to that employer. While this is true, it misses the point that an agency cannot be said to be on notice before the appeals process runs its course. Before that time, the State was merely on notice that the use of such tables was a live issue being resolved by the courts.

Finally, although the Connecticut Supreme Court has recently held that

Fitzpatrick v. Bitzer, 390 F.Supp. 278 (D.Conn. 1974), rev'd in part on other grounds, 519 F.2d 559 (2d Cir. 1975), rev'd on other grounds, 427 U.S. 445 (1976), gave employers fair warning that use of sex-based actuarial tables to compute retirement benefits is a violation of Title VII, see State of Connecticut v. Comm. on Human Rights, 211 Conn. 468, 481, 559 A.2d 1120, 1129 (1989), we respectfully disagree.

In Bitzer, the district court ruled that Connecticut's state employee retirement system which provided reduced benefits for male retirees impermissibly discriminated against men. The State Retirement Act allowed women employees with 25 years of service to retire with pension rights five years earlier than men with identical service

qualifications. The court noted that the likely reasoning of the legislature in affording women more favorable treatment was that it perceived them to be "the more dependent of the sexes and entitled to be sheltered from the rebuffs of life." Bitzer, 390 F.Supp. at 282. Thus, the discrimination invalidated in bitzer was based not on objective sex-differentiated actuarial tables compiled from statistics, but rather on the discredited notion, based on a cultural stereotype, that women are somehow "more dependent" and in need of protection. By contrast, sex-differentiated actuarial tables are based not on cultural stereotypes but rather on accurate statistics that reveal an actual disparity in the lifespans of men and women. The tables reflect the biological

fact that women, as a group, tend to live longer than men. Thus, the State's reliance on such data, although ultimately invalidated by the Supreme Court in Norris, was reasonable and quite distinguishable from the practices invalidated in Bitzer. Accordingly, we conclude that Bitzer did not give the State fair warning that its use of gender-based actuarial tables violated Title VII.

Because we conclude that this case involves unequal benefits and because we do not believe that the State was on notice prior to Norris that its health insurance credit practice was in violation of Title VII, we conclude that the first criterion of the Long test weighs against retroactive relief.

Deterrence

The second factor to be considered in determining whether a retroactive award is appropriate is whether such an award is "necessary to the operation of Title VII principles by acting to deter deliberate violations or grudging compliance." Long, 487 U.S. at 230. Graham contends that New York knew as far back as 1979 that its practice had discriminatory effects. Accordingly, she argues, a retroactive award is necessary as a "spur or catalyst" to the State as an employer to "self-examine and to self-evaluate... and to endeavor to eliminate, so far as possible, the last vestiges of their discriminatory practices." United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973) quoted in Albemarle Paper Co. v. Moody, 422 U.S.

405, 417-18 (1975). We disagree.

As discussed above, we do not believe that the State was on notice of the illegality of its benefits scheme prior to the Supreme Court's 1983 decision in Norris which put to rest any uncertainty about the validity of sex-discriminatory benefits premised upon gender-based actuarial tables. It is undisputed that after Norris New York acted promptly to implement a sex-neutral plan with respect to post-August 1, 1983 retirees. While courts in Title VII cases have the power to fashion the most complete relief possible to eliminate the effects of past discrimination, the court must arrive at a "'just result' in light of the circumstances peculiar to the case." Id. at 424 (quoting Langes v. Green, 282 U.S. 531, 541 (1931)). In view

of the State's prompt and voluntary compliance with the law, a retroactive award against the State is not necessary to insure the fulfillment of Title VII's goals.

Effect of Retroactive Liability on the State and Male Retirees

The final factor to be considered in our inquiry is whether retroactive liability will produce inequitable results for the States, employers, retirees and pension funds affected. Long, 487 U.S. at 230. We agree with the district court that a retroactive award would require either an infusion of State funds or a reduction in the benefits of male retirees, both of which are impermissible under Long.

In Long, the Supreme Court declined to award retroactive relief against a

state pension fund for violations of Title VII. The Court was concerned that such an award would interfere with the "basic financial calculus of a pension plan that determines contribution rates to support a predicted level of payments." Id. at 238 (citation omitted). Unexpected payouts from the fixed pension fund would have created a deficiency "requiring additional funds from the State and other employers to meet the increased benefits liability or forcing the pension plan to violate its contractual benefit guaranty to other retirees." Id.

Plaintiffs correctly note that this case, unlike Long, does not involve a fixed pension fund, and therefore, there is no similar concern for protecting the integrity of a pension system accumulated

under actuarial assumptions. However, this is not the end of our inquiry. The Long court, by implication, also prohibited retroactive awards that would burden the State or a private employer with additional financial obligations. The Court distinguished Spirt v. Teachers Insurance and Annuity Assoc., 735 F.2d 23 (2d Cir. 1984), by moving that in that case, a retroactive award was permissible because "[t]here, an award for future increase may require neither additional funding by the State or employer nor violation of contractual rights of other retirees." Long, 487 U.S. at 240. By contrast, the Long court explained, Florida "could not have done anything after [Norris] to eliminate [the resulting disparity in the pension fund] short of expending state funds." Id.

(quoting Norris, 463 U.S. at 1095); see also Spirt, 735 F.2d at 28 (2d Cir. 1984) (NOrris contains a "prohibition of relief provisions that impose added financial burdens on employers or plans.") Accordingly, the Court reversed the retroactive against the State.

Plaintiffs argue that because the retroactive relief they seek would require an additional appropriation of no more than $500,000 over an eleven year period that would not unduly burden the State treasury, it is not prohibited by Long. We are not persuaded. In Long, the Supreme Court specifically declined to "adopt the premise that appropriateness of a retroactive award turns on a particular pension fund's current financial status." Id. at 237. Thus, the de minimus nature of the requested relief

and the apparent relative ease with which the State could satisfy such an award are not dispositive.

Although plaintiffs have not proposed that the requested retroactive award be financed by reducing the health insurance benefits of pre-1983 male retirees, the Long court suggested that such financing might be appropriate where it would not interfere with the contractual rights of other retirees. Id. at 240. The Court noted that in Spirt we upheld a retroactive award which could be funded by reducing the benefits of male retirees who had no contractual right to any specific level of benefits. INdeed, the explanatory literature provided to the retirees in Spirt explained that "[t]he... annuity pays you a retirement income that varies year by year..."

Spirt, 735 F.2d at 27. We relied on the unspecified nature of the benefits in upholding retroactive relief against the pension plan, concluding that under such circumstances, no inequity would result from reducing the benefits of male retirees.

We agree with the district court that here, by contrast, male retirees have at least a colorable contractual right to their current level of benefits. Although New York Civil Service Law section 167(4), which sets forth the health insurance credit scheme, does not guarantee that the benefits of employees under the plan will not be diminished, upon retirement employees were informed that the State would make a specified monthly contribution toward the cost of their health insurance for the remainder

of their lives. That benefit statement may have induced reasonable reliance on the part of retirees who expected the specified monthly State contribution to supplement their fixed incomes and defray the cost of their health insurance. Under these circumstances, it would be inequitable to reduce benefits to male retirees to fund a retroactive award.[6]

CONCLUSION

The teachings of Florida v. Long suggest that retroactive relief would be inappropriate under the circumstances of this case. Accordingly, the judgment of

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6 Moreover, even if we were to find that male retirees do not have a contractual right to the State-specified level of health insurance benefits, it would not affect our decision in view of the fact that our analysis under the notice and deterrence factors of the Long test militates against a retroactive award.

the district court denying plaintiffs claim for retroactive relief under Title VII is affirmed.

FEINBERG, Circuit Judge, concurring:

I concur in the result reached by the majority.

Contrary to the majority view, I believe that this is a contributions case, not a benefits case. As the majority explains, under Civ.Serv. Law section 167(4)* (the statute), New York assigns a dollar value to a retiring employee's unused accumulated sick days by multiplying the number of such days by the employee's daily rate of pay at the time of retirement. Next, using actuarial tables, New York divides that dollar value by the number of months the employee is expected to live. New York

then adds the dollar amount of such sick leave increments to the State's own base contribution to a retiree's insurance premiums, and the retiree must pay the portion of the monthly premium beyond that amount out of his or her own pocket. Because, until August 1983, New York used gender-based actuarial tables to determine life expectancy, a female employee who retired at a given salary would thus have to contribute more to receive the same reduction in monthly health insurance costs as that enjoyed by a male employee who retired at the same salary. To put it another way, that female employee winds up paying more per month out of her pocket than does her similarly situated male counterpart.

I think that hypothetical figures will make my view of the statutory scheme

clear. Imagine that the health insurance plan costs $20 per retiree per month, and that New York's base contribution i $5 per retiree. This leaves $15 per month that must be paid, which, under the statute, is partially paid for by the dollar equivalent of accumulated unused sick days of retirees. But, because of the use of gender-based actuarial tables, the unused sick days are worth different dollar amounts for two similarly situated retirees, one male and one female; the male employee's days are worth $5 per month, while the female's are only worth $4 per month. Thus, the male employee ultimately pays $10 per month out of his pocket, and the female pays $11 per month <u>for precisely the same health insurance</u>. This as far as I can tell, is a case of unequal contributions rather than

benefits.

However, I also agree, as the majority opinion thoughtfully points out, that the manner in which the statutory scheme works is complex, that New York could therefore reasonably have concluded that the challenged statutory scheme involved benefits and not contributions and that the Supreme Court's decision in Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702 (1978), thus did not put New York on fair notice that it was violating Title VII. Majority opinion at 11. On this basis, I concur.

UNITED STATES CONSTITUTION
AMENDMENT XIV DUE PROCESS
AND EQUAL PROTECTION CLAUSES
AMENDMENT XIV.- CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1.* * * No State Shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. SECTION 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. SECTION 2000e-2. Unlawful

employment practices.

(a) Employer practices. It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. SECTION 2000e-5

(g) Injunctions; affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the

employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a) [42 U.S.C. Section 2000e-3(a)].

NEW YORK STATE CONSTITUTION Article 1, Section 11. [Equal protection of laws; discrimination in civil rights prohibited] No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

EXECUTIVE LAW Article 15, Section 296. Unlawful discriminatory practices.
1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminated against such individual in compensation or in terms, conditions or privileges of employment.

CIVIL SERVICE LAW Article 11, Section 167. Contributions.
1. The full cost of premium or subscription charges for the coverage of state employees and retired state employees who are enrolled in the basic, statewide health insurance plan established pursuant to this article shall be paid by the state. Commencing April first, nineteen hundred seventy-one, three-quarters of the cost of premium or subscription charges for the coverage of dependents of such state employees and retired state employees shall be paid by the state. Until April first, nineteen hundred seventy-one, such state employees and retired state employees shall contribute one-half of the cost of premium or subscription charges for the coverage of their dependents. The state shall contribute toward the premium or subscription

charges for the coverage of each state employee or retired state employee who is enrolled in an optional benefit plan and for the dependents of such state employee or retired state employee the same dollar amount which would be paid by the state for the premium or subscription charges for the coverage of such state employee or retired state employee and his dependents if he were enrolled in the basic, statewide health insurance plan, but not in excess of the premium or subscription charges for the coverage of such state employee or retired state employee and his dependents under such optional benefit plan. For purposes of this subdivision, employees of the state colleges of agriculture, home economics, industrial labor relations, and veterinary medicine, the state agricultural experiment station at Geneva, and any other institution or agency under the management and control of Cornell university as the representative of the board of trustees of the state university of New York, and employees of the state college of ceramics under the management and control of Alfred university as the representative of the board of trustees of the state university of New York, shall be deemed to be state employees whose salaries or compensation is paid directly by the state.

2. Each participating employer shall be required to pay not less than fifty percentum of the cost of premium or subscription charges for the coverage of its employees and retired employees who are enrolled in the basic, statewide

health insurance plan established pursuant to this article. Such employer shall be required to pay not less than thirty-five percentum of the cost of premium or subscription charges for the coverage of dependents of such employees and retired employees. Such employer shall contribute toward the premium or subscription charges for the coverage of each employee or retired employee who is enrolled in an optional benefit plan and for the dependents of such employee or retired employee the same dollar amount which would be paid by such employer for the premium or subscription charges for the coverage of such employee or retired employee and his dependents if he were enrolled in the basic, statewide health insurance plan, but not in excess of the premium or subscription charges for the coverage of such employee or retired employee and his dependents under such optional benefit plan. Subject to such regulations as the president may prescribe, any participating employer may elect to pay higher rates of contribution for the coverage of employees, retired employees and their dependents; provided, however, that notwithstanding the provisions of subdivision six of section one hundred sixty-seven of this chapter, if a participating employer elects to pay a higher or lower rate of contribution for its retired employees or their dependents, or both, than that paid by the state for its retired employees or their dependents, or both, amounts withheld from the retirement allowances of such retired employees for their share of premium or subscription charges, if

any, shall, if the president so requires, be paid to such participating employer which shall pay into the health insurance fund the full cost of premium or subscription charges for the coverage of such retired employees and their dependents. Such election shall be exercised by the adoption of a resolution by its governing body and, in the case of any municipal corporation where a resolution of its governing body is required by law to be approved by any other body or officer, such resolution shall also be approved by such other body or officer.

3. Contributions, if any, required to be paid by an employee or a retired employee for his coverage and for the coverage of his dependents, if any, shall be deducted from his salary payments or from his retirement allowance, as the case may be.

4. Upon the retirement, on or after July first, nineteen hundred sixty-five, of a state employee whose salary or compensation is paid directly by the state, who is subject to a plan established by law, rule, regulation, written order or written policy which provides for the regular earning and accumulation of sick leave, and who is eligible to continue coverage under the health insurance plan after retirement, the department of civil service shall determine, based on the employee's age at the time of retirement, the actuarial equivalent in monthly installments for the remaining life expectancy of such retired employee, of the dollar value of the earned and accumulated but unused sick leave standing to his credit at the

time of retirement, without interest. Such dollar value shall be based on the employee's salary at the time of retirement. In addition to regular employer contributions, contributions in the amount of such monthly installments shall be paid from the state's appropriation to the health insurance fund and applied towards the charges for health insurance on account of such retired employee and his dependents, to the extent necessary to pay such charges. The remaining amount, if any, necessary to pay such charges shall be contributed by such retired employee. On or after October first, nineteen hundred seventy when such dollar value of such sick leave amounts to less than one hundred dollars for a particular retired employee, in lieu of contributions which would otherwise be required from such retired employee, additional contributions shall be paid for the state's appropriation to the health insurance fund and applied towards the charges for health insurance on account of such retired employee and his dependents until the sum of such additional contributions equals such dollar value of such sick leave. The remaining amount, if any, necessary to pay such charges shall be contributed by such retired employee. For purposes of this subdivision, employees of the state colleges of agriculture, home economics, industrial labor relations, and veterinary medicine, the state agricultural experiment at Geneva, and any other institution or agency under the management and control of Cornell university as the representative of the

board of trustees of the state university of New York, and employees of the state college of ceramics under the management and control of Alfred university as the representative of the board of trustees of the state university of New York, shall be deemed to be state employees whose salaries or compensation is paid directly by the state.

5. Subject to such regulations as the president may prescribe, any participating employer may elect to make additional contributions towards charges for health insurance coverage on account of its retired employees and their dependents, based on the dollar value of their sick leave accumulated but unused at the time of retirement. Such election shall apply tom employees in the service of the participating employer who retire on or after the effective date of such election, who are subject to a plan established by law, rule, regulation, written order or written policy which provides for the regular earning and accumulation of sick leave, and who are eligible to continue coverage under the health insurance plan after retirement. The participating employer shall certify to the department of civil service the dollar value of earned and accumulated but unused sick leave standing to the credit of an employee at the time of his retirement. Additional contributions shall be paid by such participating employer and applied towards charges for health insurance on account of its retired state employees and their dependents.

6. There is hereby created a health

insurance fund which shall be available without fiscal year limitation for premium or subscription charge payments under any contract or contract purchased in accordance with this article. The amount withheld from employees and retired employees under subdivision three of this section, all amounts appropriated by the state to such health insurance fund, and all amounts contributed by any participating employer pursuant to subdivision two of this section, shall be credited to such health insurance fund. The income derived from any dividends, premium rate adjustments or other refunds under any such contract or contracts shall be credited to such fund and retained therein as a special reserve for adverse fluctuation in future charges under an such contract or contracts.

7. The amounts required to be paid to any contracting corporation under any contract entered into pursuant to the provision of this article shall be payable from such health insurance fund as audited by and upon the warrant of the comptroller on vouchers certified or approved by the president.